

(26,268)—(26,269)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 801.

**THE DENVER & RIO GRANDE RAILROAD COMPANY,
PLAINTIFF IN ERROR,**

vs.

THE CITY AND COUNTY OF DENVER ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 802.

**THE DENVER & RIO GRANDE RAILROAD COMPANY,
PLAINTIFF IN ERROR,**

vs.

THE CITY AND COUNTY OF DENVER ET AL.

**IN ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY
OF DENVER, STATE OF COLORADO.**

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1 District Court, City and County of Denver, Second Judicial District.

STATE OF COLORADO,

City and County of Denver, ss:

Pleas in the District Court of the City and County of Denver, State of Colorado, in the Third Division thereof, before the Hon. Charles C. Butler, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court-house in Denver, in said County, on the second Tuesday (it being the 14th day) of April, A. D. one thousand nine hundred and fourteen.

Present:

Hon. Charles C. Butler, one of the Judges of the District Court.

John A. Rush, Esq., District Attorney of said District.

Alexander Nisbet, Esq., Commissioner of Safety, ex-Officio Sheriff of said County.

J. Sherman Brown, Esq., Clerk of said Court.

8583.

Filed in the Supreme Court of the State of Colorado, Feb. 17, 1915. James R. Killian, Clerk.

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No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, et al.

Be it remembered, that heretofore and on to-wit the 26th day of May, A. D. 1914, came the plaintiff by its attorneys, E. N. Clark, Esquire, and R. G. Lucas, Esquire, and filed herein its Complaint.

And said Complaint is in words and figures as follows, to-wit:

3 Filed in District Court, City & County of Denver, Colo., May 26, 1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

VS.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Complaint.

Comes now the above named plaintiff, The Denver and Rio Grande Railroad Company, by E. N. Clark and R. G. Lucas, its attorneys, and complains of the above named defendants the City and County of Denver, J. M. Perkins, as Commissioner of Social Welfare, and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, and all of them, and each of them, and respectfully shows to the court, and alleges:

4

I.

That the above named plaintiff, The Denver and Rio Grande Railroad Company, is, and ever since the 27th day of July, A. D. 1908, has continuously been a consolidated corporation duly organized, created and existing under and by virtue of the laws of the State of Colorado and of the State of Utah.

II.

That the above named defendant, the said City and County of Denver (hereinafter, for brevity, sometimes called the "Defendant

City") is, and ever since the first day of December, A. D. 1902, has been a body politic and corporate and a municipal corporation located and existing in the State of Colorado under and by virtue of and created under and by virtue of Article XX of the Constitution of the State of Colorado, and as such said defendant City has among other powers, that of suing and defending, pleading and being impleaded in all courts and places and in all matters and proceedings by that name; that under and by virtue of the charter of said defendant City adopted March 29, A. D. 1904, as amended by the amendments thereto adopted on February 14, A. D. 1913, all legislative powers possessed by said defendant City, except as in said charter otherwise specifically provided since said last mentioned date, have been and are vested in a council of five Commissioners therein designated as follows, to-wit: Commissioner of Social Welfare, Commissioner of Finance, Commissioner of Safety, Commissioner of Improvements, and Commissioner of Property; that on March 1, A. D. 1914, the defendant, J. M. Perkins, was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Social Welfare and Mayor of said defendant City; that on March 1, A. D. 1914, the defendant, Clair J. Pitcher was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Finance of said defendant City; that on March 1, A. D. 1914, the defendant, Alexander Nisbet, was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Safety of said defendant City; that on March 1, A. D. 1914, the defendant, John B. Hunter, was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Improvements of said defendant City; that on March 1, A. D. 1914, the defendant, Otto F. Thum, was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Property of said defendant City, and that said defendants, J. M. Perkins, Clair J. Pitcher, Alexander Nisbet, John B. Hunter and Otto F. Thum, were, on March 1, A. D. 1914, and long prior thereto had been, and since then have continuously been, and now are citizens of the United States of America and citizens and residents of the said City and County of Denver and State of Colorado.

III.

That prior to the adoption of Article XX of the Constitution of the State of Colorado, on the first day of December, A. D. 1902, there existed a duly created, organized and chartered Municipal Corporation located in the County of Arapahoe, in the State of Colorado, and known as the City of Denver, and under and by virtue of said Article XX of the Constitution of the State of Colorado, and the amendments thereto, said Municipal Corporation, formerly known as the City of Denver, in said Arapahoe County, Colorado, together with certain other municipal corporations and quasi-municipal corporations in said Article XX of the Constitution of the State of Colorado enumerated, were thereby consolidated and declared to be

a single body politic and corporate by the name of the "City and County of Denver," which said City and County of Denver is the defendant City herein; and it was, and is expressly provided
6 in and by said Article XX of the Constitution of the State of Colorado, that said defendant City shall and did succeed to all the rights, liabilities, and assumed all the obligations of said municipal corporation formerly known as the City of Denver in said Arapahoe County.

IV.

That The Denver and Rio Grande Railway Company, one of the predecessors in interest of this plaintiff, was duly created, organized and incorporated on the 29th day of October, A. D. 1870, under and in conformity to the laws of the then Territory of Colorado; and its Articles or Certificate of Incorporation were duly filed in the office of the Secretary of the said Territory of Colorado, on said 29th day of October, A. D. 1870; and that in and by said Articles or Certificate of Incorporation, so filed as aforesaid, the term of the corporate existence of said The Denver and Rio Grande Railway Company was fixed at fifty years from the said date of said filing of said Articles or Certificate of Incorporation; and the business of said The Denver and Rio Grande Railway Company, expressed in said Articles or Certificate of Incorporation, so filed as aforesaid, was to locate, construct, maintain and operate certain railway and telegraph lines therein described, including the line or portion of line in controversy herein, including, to-wit, the line of railroad constructed on Wynkoop Street across the intersection of that street with Seventeenth Street in the present defendant City; and in and by said Articles or Certificate of Incorporation, the principal place of business of said The Denver and Rio Grande Railway Company was located and fixed at said former City of Denver, Arapahoe County, State of Colorado; and said Railway Company was authorized and empowered by law to acquire all property, rights, privileges and franchises reasonably necessary
7 or convenient to enable said Railway Company to carry on the operations named in said Articles or Certificate of Incorporation.

V.

That heretofore, and on, to-wit, the 15th day of June, A. D. 1871, the then City Council of said the City of Denver, in said County of Arapahoe, in the State of Colorado, (one of the constituent corporations of the defendant City as aforesaid), in pursuance of, and under and by virtue of, the authority and power in it duly vested by law, passed, enacted, adopted and approved an Ordinance known as Ordinance No. 9 of the Series of 1871, wherein and whereby, and by the terms whereof, said City Council of said the City of Denver, granted to said The Denver and Rio Grande Railway Company, the right of way and the right, easement and franchise to build, operate and maintain its railway line upon, along, over and across and

through certain streets in said the City of Denver, therein named, including the right, privilege and franchise to locate, construct, maintain and operate its railway tracks along Wynkoop Street and across Seventeenth Street, in said the City of Denver, now the defendant City; a true copy of said Ordinance No. 9 of the Series of 1871 is attached to this complaint and marked Exhibit "A" and hereby made part hereof, and hereby, by the plaintiff, asked to be read in connection herewith and as a part hereof.

VII.

That immediately upon the passage and enactment of said Ordinance No. 9 of the Series of 1871, above mentioned, said The Denver and Rio Grande Railway Company, predecessor in interest of this plaintiff, duly accepted the provisions of said Ordinance No. 9 of the Series of 1871, and acting upon the faith thereof, and in reliance thereupon, immediately, and at a great expenditure of time, labor and money, proceeded to, and did, prior to the first day of 8 August, A. D. 1871, locate, construct, maintain and operate its railway track and lines over, upon, along, through and across certain streets and the right of way in said Ordinance No. 9 of the Series of 1871, mentioned and described, including said Wynkoop Street and said Seventeenth Street, and on or before said last mentioned date, did locate, construct, maintain and operate its railway track along Wynkoop Street and across Seventeenth Street in the said former City of Denver, now the defendant City; and said Railway Company duly complied with and performed all the terms, covenants, conditions and obligations by it to be performed under the provisions of said Ordinance No. 9 of the Series of 1871, and the successors in interest of said Railway Company, including this plaintiff have at all times complied with and performed all the terms, covenants, conditions and obligations by them to be performed under said Ordinance No. 9 of the Series of 1871.

VII.

That when said Ordinance No. 9 of the Series of 1871, above mentioned, was so accepted and acted upon by said The Denver and Rio Grande Railway Company, and the tracks of said The Denver and Rio Grande Railway Company were located, laid out, constructed, maintained and operated by said The Denver and Rio Grande Railway Company, as aforesaid, said Ordinance No. 9 of the Series of 1871 became and ever since its passage, enactment and adoption has been and now is created and constituted valid contract and an irrevocable franchise between said the City of Denver and the said defendant City and said The Denver and Rio Grande Railway Company and its successors in interest, including this plaintiff, and a contract and franchise which the said City of Denver and the defendant City was and is not at liberty to impair during its continuance and was and is a contract and franchise whereby said The Denver and Rio Grande Railway Company and its succes-

9 sors in interest including this plaintiff, is and are secured in the exercise and enjoyment of the right of way and the rights, powers, privileges and franchises conferred by said Ordinance No. 9 of the Series of 1871, and the said Ordinance No. 9 of the Series of 1871 and the right of way and the rights, powers, privileges and franchises therein conferred became, upon the acceptance thereof, as aforesaid, by said The Denver and Rio Grande Railway Company, a substantial vested property and property right of said The Denver and Rio Grande Railway Company, and its successors in interest, including this plaintiff.

VIII.

That this plaintiff is the legal and equitable successor in interest to, and the owner and possessor of all and singular the property, real, personal and mixed, and the rights, powers, privileges and franchises of every kind and character whatsoever heretofore owned or possessed or in any manner vested in said The Denver and Rio Grande Railway Company, the predecessor in interest of this plaintiff, including all the right, title, interest, estate, property, franchise and privilege of said The Denver and Rio Grande Railway Company, of, in and to and with respect to said Ordinance No. 9 of the Series of 1871.

IX.

That on, to-wit the 8th day of June, A. D. 1872, there was duly enacted by the Congress of the United States of America, an Act (17 State 339), entitled "An Act granting the right of way through the public lands to The Denver and Rio Grande Railway Company," wherein and whereby it was provided that:

10 "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes and for yard room, and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles; and the right to take from the public lands adjacent thereto, stone, timber, earth, water and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns, and all the rights, powers and franchises conferred by the said laws on corporations created under them for constructing and operating railroad and telegraph lines are hereby ratified and confirmed to the above named railway company, its successors and assigns, and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines are hereby granted to the said company, its successors and assigns, for the ex-

tension and operation of its railway and telegraph lines in and through any contiguous territory of the United States, to the northern boundary line of Mexico, subject to the compliance with the conditions and requirements of the general incorporation laws of such territory, so far as the same are applicable and not inconsistent with the laws of the United States; and the same rights, powers and privileges conferred upon the Union Pacific Railroad Company, by section three of an act approved July second, eighteen hundred and sixty-four, are hereby conferred upon the above named company, its successors and assigns. Provided, that application for the assessments of damages shall be made to the court or any judge of a court having jurisdiction in the county in which the lands or premises lie. Provided, that said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe, within five years of the passing of this act, and shall complete fifty

11 miles addition south of said point in each year thereafter; and in default thereof, the rights and privileges herein granted shall be rendered null and void, as far as respects the unfinished portion of said road. And provided further, that the said Denver and Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed and legalized as existing from the said date of incorporation; but beyond such recognition, ratification, and confirmation of and to said company, this act shall not be construed as affirming or denying the rights of territories to pass laws for the incorporation of railway companies.

"Approved June 8, 1872."

That on, to-wit, the 3rd day of March, A. D. 1875, there was enacted by the Congress of the United States of America, an Act (— Stats —), entitled "An Act to correct a clerical error in the Act granting the right of way through the public lands to The Denver and Rio Grande Railway Company, approved June eighth, eighteen hundred and seventy-two," wherein and whereby it was provided that:

"Whereas, in the third session of the Forty-second Congress, the committee of conference on the disagreeing votes of the two houses on the amendments to the bill (S. 984) granting the right of way through the public lands to the Denver and Rio Grande Railway Company, submitted as part of their report the recommendation that the second proviso in the amendment of the House of Representatives adding *privileges* to the end of the bill be stricken and the following words be inserted:

12 "And provided further, That the said Denver and Rio Grande Railway Company in hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges, and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed, and legalized as existing from the said date of incorporation; but beyond such recognition, ratification, and confirmation of and

to said company, this act shall not be construed as affirming or denying the rights of Territories to pass laws for the incorporation of railway companies,' which report of said committee of conference was concurred in by both houses; and,

"Whereas, in transcribing the bill, the said second proviso in the amendment of the House of Representatives was not stricken out and the above quoted words were not inserted and do not appear in the law upon the statute books; therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That, the said words above quoted shall be considered and taken as they are intended to be, and they are hereby made a part of said act as approved June eighth, eighteen hundred and seventy-two.

"Approved March 3, 1875."

That on, to-wit, the 3rd day of March, A. D. 1877, there was enacted by the Congress of the United States of America, an Act (19 Stats. 405) entitled "An Act to amend an act entitled 'An Act granting the right of way through the public lands to the Denver and Rio Grande Railway Company, approved June 8, 1872,' " wherein and whereby it was provided that:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled 'An Act granting the right of way through the public lands to the Denver and Rio Grande Railway Company,' ap-

13 proved June eighth, eighteen hundred and seventy-two, be and the same is hereby amended by making the second proviso in said act read as follows:

"Provided, that said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

"Approved March 3, 1877."

X.

That the defendant City is the successor to the former City of Denver as aforesaid, and by virtue of the provisions of Article XX of the Constitution of the State of Colorado and the various statutory and legal proceedings under which defendant City was organized and by law and in equity and in good conscience defendant City upon its organization and creation was and since then at all times has been and now is bound by the provisions of said Ordinance No. 9 of the Series of 1871, and the contract and franchise thereby and thereunder created, as aforesaid, and during all of said times was and is bound to recognize and observe the same and faithfully perform and carry out the same and permit the said The Denver and Rio Grande Railway Company, and its successors, including the plaintiff in this action, to exercise and enjoy, and to continue to exercise and enjoy the rights, powers, privileges, franchises and

easements by said Ordinance No. 9 of the Series of 1871 conferred and granted and thereby and thereunder created as aforesaid.

XI.

That since the passage, enactment, approval and adoption of said Ordinance No. 9 of the Series of 1871, said former City of
14 Denver and its successor, the defendant City, have repeatedly and constantly recognized the validity of said Ordinance No. 9 of the Series of 1871, and have repeatedly and constantly ratified, confirmed and continued the said Ordinance No. 9 of the Series of 1871, and the exercise and enjoyment of said The Denver and Rio Grande Railway Company, and its successors, including this plaintiff, of the rights, powers, privileges, franchises and easements by said Ordinance No. 9 of the Series of 1871 created and conferred and thereunder created and exercised, to-wit, by Chapter 28 of the Revised Ordinances of the said former City of Denver of 1878, wherein and whereby it was provided that all the rights and privileges granted to said The Denver and Rio Grande Railway Company through and across certain streets under and by virtue of said ordinance No. 9 of the Series of 1871 were continued and confirmed, and, to-wit, by Ordinance No. 30 of the Series of 1881, approved May 17, 1881, whereby the confirmation of said franchise by said Chapter 28 of the Revised Ordinances of the said City of Denver for 1878, confirming the rights of way and other privileges theretofore granted to said The Denver and Rio Grande Railway Company were further confirmed, ratified and continued; and also, to-wit, by Ordinance No. 1 of the Series of 1878, approved January 10, 1878, whereby the prior rights of said The Denver and Rio Grande Railway Company with respect to said Wynkoop Street and said Seventeenth Street and other streets under said Ordinance No. 9 of the Series of 1871, were recognized and extended and added to, and also, to-wit, by section 2 of Ordinance No. 7 of the Series of 1886, approved January 19, 1886, whereby the provisions of said Ordinance No. 9 of the Series of 1871, bearing date June 1, 1871, were supplemented and continued; and also, to-wit, by the attempted revocation Ordinance passed by the Council of the defendant City on March 30, 1914, as hereinafter set forth.

15

XII.

That the track constructed on said Wynkoop Street across said Seventeenth Street in the defendant City by said The Denver and Rio Grande Railway Company prior to August 1, -871, as aforesaid, and which is the only track this plaintiff has within the limits of the intersection of said Wynkoop Street and Seventeenth Street, was the original main line of said The Denver and Rio Grande Railway Company and gave to and was laid for the purpose of securing access to and was used in reaching the old depot of the Kansas Pacific Railway Company located at Nineteenth Street in

said former City of Denver and in the defendant City; and up to the time of the construction of the present Union Depot in the defendant City, about 1880 or 1881, said track was used as the main passenger track of said The Denver and Rio Grande Railway Company, the passenger business of which said Company was conducted at said old depot of said Kansas Pacific Railway Company. Said Kanas Pacific Railway Company's old depot came to be known as the Union Pacific old depot, and was located at said Nineteenth and Wynkoop Streets, as aforesaid. Subsequently, and many years prior hereto, numerous industries were built up on said Wynkoop Street between said Seventeenth Street and said Nineteenth Street in reliance upon the continued operation across said Seventeenth Street and along said Wynkoop Street of said track, and said The Denver and Rio Grande Railway Company, and this plaintiff, and its predecessors in interest at various times in 1884, 1886, 1889 and 1892, constructed side tracks and industrial spur tracks on said Wynkoop Street under said Ordinance No. 9 of the Series of 1871 (none of which said spur or side tracks cross said Seventeenth Street). And this plaintiff and its predecessors in interest have ever since the first day of August A. D. 1871, openly, notoriously, ex-

clusively, continuously, peaceably, uninterruptedly and
16 under a claim of right known to the defendants herein and each of them and to said former City of Denver, and daily and from day to day, without complaint, objection, interruption or interference by or from said former City of Denver or the defendants herein, or any one else, and for a period of over forty years, used, maintained and operated said track on said Wynkoop Street across said Seventeenth Street, in the defendant City, as part of its main line, and as a means and facility for serving said industries on said Wynkoop Street and setting out cars to said industries for loading and unloading and picking up cars loaded and unloaded thereat, and said track during all said time was used by this plaintiff and its predecessors in interest, and is now being used by this plaintiff, and has been used by this plaintiff ever since its formation in 1908, as aforesaid, as an integral part and parcel of its railway system engaged at all said times in interstate commerce and in the transportation of persons and property between Colorado and the several other States and Territories of the United States and the District of Columbia, and foreign countries. Among the industries so built up in reliance upon said track, as aforesaid, and so served by this plaintiff and its predecessors in interest, as aforesaid, are prominent and important lumber industries, mercantile interests, machinery interests, mining and milling supply company interests, and other interests, all of vast public importance to the commercial and financial interests of the defendant City and the public at large. This plaintiff and its predecessors in interest have heretofore handled all of the freight originating at or destined to said industries, where such freight came into or departed from the City via the lines of this plaintiff and its predecessors in interest or other lines of railroad. In other words, this plaintiff and its predecessors in interest have served those industries to the exclusion of all other

17 railroads. The number of cars handled to and from those industries would approximate about a thousand cars a year. Said track constructed and used on said Wynkoop Street across the intersection of said Seventeenth Street is the only means of access to said industries, and if said track is removed or obstructed at said intersection of said Seventeenth Street, or this plaintiff is interfered with in the maintenance, use and operation of said track across said Wynkoop Street at the intersection of said Seventeenth Street, it will be impossible for this plaintiff to serve said industries, and its patrons on said Wynkoop Street between said Seventeenth Street and said Nineteenth Street. And this plaintiff would lose large revenues amounting to several thousand dollars annually for switching services performed for these industries in connection with cars to and from railroad lines other than that of this plaintiff; and in addition thereto, would have to pay to other lines a switching charge for setting out cars of freight in and to said industries if the same could be reached from the Nineteenth Street end of the track, aforesaid, and this in turn would amount to several thousand dollars annually, and therefore plaintiff says that it would lose large sums of money running into thousands of dollars annually which it is impossible to estimate by any definite standard of admeasurement. And plaintiff further says that the public interests and the interests of those industries are involved herein for the reason that unless this plaintiff be permitted to continue the use of said track across said Seventeenth Street said industries and the public served by said track and the spur tracks and the side tracks therefrom, will be compelled to absorb the switching charges to and from said industries. And plaintiff further says that since the passage of the Ordinance of 1914 hereinafter referred to, said tracks across said Seventeenth Street has only been used in the interchange of business between the hours of one A. M. and six

18 A. M., and then only for such traffic as was and is necessary in the regular conduct of the business of the said industries situated on said Wynkoop St. between said Seventeenth Street and Nineteenth Street, as aforesaid. And plaintiff further alleges that any interference with said track across said Seventeenth Street of the right of this plaintiff to use, operate and maintain the same, would seriously impair and destroy the ability of this plaintiff to serve its patrons, the aforesaid industries, and would occasion an irreparable injury to this plaintiff and an injury not susceptible of definite admeasurement in damages, and any interference with this plaintiff in the use of said tracks across said Seventeenth Street, or any interference with said track, or the obstruction of the same, or the removal thereof, would impair the contract rights of this plaintiff in the premises in violation of the Constitution of the United States and of the State of Colorado, and would take the property of this plaintiff without due process of law, and without compensation, in violation of the Constitution of the United States and of the State of Colorado, and would deny to this plaintiff the equal protection of the laws in violation of the Constitution of the United States and of the State of Colorado, and would impose an

onerous burden and constitute an illegal interference with the interstate commerce traffic and business of this plaintiff in violation of the interstate commerce clause of the Federal Constitution, and impair the contract created between this plaintiff and its predecessors in interest and the United States Government by virtue of the Acts of Congress heretofore herein set forth.

XIII.

That on March 30, A. D. 1914, while the facts, conditions and circumstances hereinbefore set forth existed, the Council of said defendant City, in disregard and in violation of its obligations and those of the defendant City in the premises, and with an intent to repudiate the same, and with an intent to unlawfully and illegally destroy the rights of the plaintiff in the premises, suddenly, arbitrarily, inequitably and illegally passed, adopted and enacted an Ordinance known as "Ordinance No. 34, Series 1914, Commissioner Bill No. 31, Introduced by Commissioner Hunter," the same being entitled, "A bill for an ordinance repealing Ordinance No. 60 of the series of 1886, and Ordinance No. 9 of the series of 1871, and Ordinance No. 7 of the series of 1886, and Ordinance No. 63 of the series of 1892, and all other ordinances or parts of ordinances in conflict herewith, and providing for the elimination of all railway tracks at the Seventeenth street crossing where the same intersects Wynkoop street in the city and county of Denver, and providing for the removal of all said tracks at said Seventeenth street crossing by the Denver and Rio Grande Railway Company and the Union Pacific Railway Company, or by the Commissioner of Improvements." A true copy of said Ordinance No. 34 of the Series of 1914, is hereto annexed and marked Exhibit "B," and hereby referred to and made part hereof; said Ordinance No. 34 of the Series of 1914, was published in the "Denver Times," a newspaper of general circulation in the said City and County of Denver, on April 1, A. D. 1914; that said Ordinance No. 34 of the Series of 1914, Exhibit "B," was introduced into the Council on the 9th day of March, A. D. 1914, by the defendant John B. Hunter as Commissioner of Improvements of said defendant City, as Commissioner Bill No. 31; and a copy of said Ordinance so introduced with a notice of the introduction thereof was published in said "Denver Times" on the 12th day of March A. D. 1914, and prior to the passage, enactment and adoption of said Ordinance No. 34 of the Series of 1914, this plaintiff caused to be served upon each of the defendants herein a protest against the passage of said Ordinance and Commissioner Bill No. 31, a copy of which said protest is hereto annexed and made part hereof and marked Exhibit "C"; that by said protest this plaintiff clearly called to the attention of said Council and the defendants herein the distinction between the track as a structure and the use of it and pointed out that any inconvenience arising from the manner of using the track theretofore employed might be avoided without passing said Ordinance and destroying the structure itself, and in and by said protest the plaintiff recognized as it does now recognize

that the exercise of its rights in the premises may be subject to any proper, reasonable and valid police regulation with respect to the manner of making use of the structure in question, but denies, as it now denies, the power of the defendants in the premises to destroy the structure in question or any part thereof, or cause this plaintiff to destroy the same or any part thereof.

That said Ordinance No. 34 of the Series of 1914, became effective under the provisions of the charter of the defendant City on the first day of May, A. D. 1914.

That on the 2nd day of May, A. D. 1914, the defendant, John B. Hunter, as Commissioner of Improvements of the said defendant City, acting under and in pursuance to the provisions of section 3 of said Ordinance No. 34 of the Series of 1914, served or caused to be served upon this plaintiff a notice, a true copy of which is hereto annexed and marked Exhibit "D" and hereby made part hereof.

XIV.

That said Ordinance No. 34 of the Series of 1914, is unconstitutional, invalid, illegal, unlawful and void, for the following reasons, among others, to-wit: It impairs the obligation of a contract, and impairs the contractual obligation and rights of the plaintiff in the premises in violation of the inhibition of section 10 of Article I of the Constitution of the United States; it impairs the obligation of a contract, and impairs the contractual obligations and rights of the plaintiff in the premises in violation of section 11 of Article

21 II of the Constitution of the State of Colorado; it deprives the plaintiff of its vested property and rights and property rights in the premises without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; it denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; it deprives the plaintiff of its vested property and property rights in the premises without due process of the law in violation of section 25 of Article II of the Constitution of the State of Colorado; it takes the property and property rights of the plaintiff in the premises without just compensation in violation of section 15 of Article II of the Constitution of the State of Colorado; it operates as a burden upon and as an unlawful and unwarrantable regulation of and interference with interstate commerce and the transaction by the plaintiff of its interstate commerce business in violation of section 8 of Article I of the Constitution of the United States; it is in conflict with and repugnant to the Act of the Congress of the United States, approved March 3, 1875 (— Stats. —), entitled "An Act to correct a clerical error in the Act granting a right of way through the public lands to the Denver and Rio Grande Railway Company," approved June 8, 1872, and with the Act of the Congress of the United States, approved June 8, 1872 (— Stats. —), entitled "An Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company," hereinbefore set forth, and it is unnecessarily onerous and oppressive and in un-

reasonable and unfair and is unnecessarily drastic in character, and all inconvenience and danger to the public involved in the use of the track in question might readily be prevented by reasonable regulation of the use of such track in the operating of cars and trains and locomotives thereover without destroying the structure which has been lawfully constructed, laid, maintained and operated, as aforesaid.

22

XV.

That the defendants and each of them have threatened to and do threaten to, and unless restrained by the order and judgment of this Honorable Court will, with strong hand, remove the track maintained and operated by this plaintiff on said Wynkoop Street across said Seventeenth Street, in the defendant City, as aforesaid, and the plaintiff has no means of preventing the execution of such threats, or the enforcement of said Ordinance No. 34 of the Series of 1914, except through the intervention of this Honorable Court; and the enforcement of said Ordinance No. 34 of the Series of 1914, and the execution of said threats by the attempt so to do will injure, impair, disturb, destroy and deprive this plaintiff of its property and rights and property rights in the premises, and the plaintiff's enjoyment and exercise of its rights, powers and privileges in the premises, and will interrupt, hinder, annoy and delay the plaintiff in the performance of its public duties to its patrons, and to the industries which have been built up in reliance upon the exercise of plaintiff's property rights in the premises, and will cripple and injure the said industries and would constitute a repudiation of the obligations of the defendants and each of them in the premises to the plaintiff's great ruinous and irreparable loss and damage, and would inflict upon this plaintiff a loss and damage and injury which could not be adequately estimated in damages and of a character for which no pecuniary damage would be an adequate compensation; and this plaintiff has no plain, speedy or adequate remedy at law, or any remedy at law, and has an adequate remedy only in a court of equity where matters of this nature are properly cognizable and reviewable; and said defendants and each of them are insolvent and pecuniarily irresponsible, and would not be able to respond in damages to this plaintiff for the recovery threatened, as aforesaid; and the enforcement of said Ordinance No. 34 of the Series of 1914, and the execution

23 of the threats to enforce the same, as aforesaid, would impair the contractual obligations and rights of the plaintiff in the premises in violation of section 10 of Article I of the Constitution of the United States, and in violation of section 11 of Article II of the Constitution of the State of Colorado, and would deprive this plaintiff of its vested property and rights and property rights in the premises without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in violation of section 25 of Article II of the Constitution of the State of Colorado, and would deny to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Con-

stitution of the United States, and would constitute a taking of the property and property rights of the plaintiff in the premises without just compensation in violation of section 15 of Article II of the Constitution of the State of Colorado, and would operate as a burden upon and as an unlawful and unwarrantable regulation of and interference with interstate commerce, and the transaction by the plaintiff of its interstate commerce business in violation of section 8 of Article I of the Constitution of the United States, and would be an unlawful interference with the property and property rights of the plaintiff under and by virtue of the Acts of the Congress of the United States, approved March 3, 1875 (— Stats. —), entitled "An Act to correct a clerical error in the Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company, approved June 8, 1872," and the Act of the Congress of the United States, approved June 8, 1872 (— Stats. —), entitled "An Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company," hereinbefore set forth, and would unnecessarily, oppressively, unreasonably and unfairly destroy the property and rights of this plaintiff in the premises without any corresponding benefit or right to the public or the protection of the public in the premises.

24 Wherefore, plaintiff prays judgment as follows:

1. That this court will make and enter of record herein its judgment or decree adjudging and declaring said Ordinance No. 34 of the Series of 1914 unconstitutional, illegal, unlawful and void, and of no force and effect, for the following reasons, among others, to-wit: it impairs the obligation of a contract, and impairs the contractual obligation and rights of the plaintiff in the premises in violation of the inhibition of section 10 of Article I of the Constitution of the United States; it impairs the obligation of a contract, and impairs the contractual obligations and rights of the plaintiff in the premises in violation of section 11 of Article II of the Constitution of the State of Colorado; it deprives the plaintiff of its vested property and rights and property rights in the premises without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; it denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; it deprives the plaintiff of its vested property and property rights in the premises without due process of the law in violation of section 25 of Article II of the Constitution of the State of Colorado; it takes the property and property rights of the plaintiff in the premises without just compensation in violation of section 15 of Article II of the Constitution of the State of Colorado; it operates as a burden upon and as an unlawful and unwarrantable regulation of and interference with interstate commerce and the transaction by the plaintiff of its interstate commerce business in violation of section 8 of Article I of the Constitution of the United States; it is in conflict with and repugnant to the Act of the Congress of the United States, approved March 3, 1875 (— Stats. —), entitled "An Act to correct a clerical error

25 in the Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company, approved June 8, 1872," and with the Act of the Congress of the United States, approved June 8, 1872 (— Stats. —), entitled "An Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company," hereinbefore set forth; and it is unnecessarily onerous and oppressive, and is unreasonable and unfair, and is unnecessarily drastic, in character, and all inconvenience and danger to the public involved in the use of the tracks in question might readily be prevented by reasonable regulation of the use of such tracks in the operating of cars and trains and locomotives thereover without destroying the structure which has been lawfully constructed, laid, maintained and operated, as aforesaid.

2. That this court will grant unto the plaintiff a temporary restraining order issued out of and in accordance with the rules and practice of this Honorable Court to be directed to the defendants herein and each of them, commanding said defendants and each of them, and the respective successors in office of them, and each of them, and the officers, deputies, servants, agents, employes, associates, attorneys, counsellors, and solicitors, of them and each of them, and any and all persons acting in aid or assistance of them and each of them, or any of them, or under the authority, direction, sanction or control of them, and each of them, absolutely to desist and refrain from and enjoining and restraining the defendants and each of them, and all persons aforesaid, from directly or indirectly doing, procuring or suffering to be done any act under said Ordinance No. 34 of the Series of 1914, or under the authority or sanction thereof, or from enforcing or attempting to enforce said Ordinance No. 34 of the Series of 1914, or any part thereof, or from removing, obstructing,

26 or in any manner molesting or interfering, for any purpose whatsoever, with said tracks maintained and operated by the plaintiff on said Wynkoop Street across said Seventeenth Street in the defendant City, or in any manner or for any purpose molesting or interfering with this plaintiff in the exercise and enjoyment of its rights, powers, privileges and franchises in the premises until such time as this court may direct and appoint a hearing upon notice herein.

3. That this court will grant unto the plaintiff its temporary writ of injunction issued out of and in accordance with the rules and practice of this Honorable Court, to be directed to the defendants herein, and each of them, commanding said defendants, and each of them, and the respective successors in office of them, and each of them, and the officers, deputies, servants, agents, employes, associates, attorneys, counselors, and solicitors, of them and each of them, and any and all persons acting in aid or assistance of them, and each of them, or any of them, or under the authority, direction, sanction or control of them, and each of them, absolutely to desist and refrain from, and enjoining and restraining the defendants, and each of them, and all persons aforesaid, from directly or indirectly doing, procuring or suffering to be done any act under said Ordinance No. 34 of the Series of 1914, or under the authority or sanction thereof,

or from enforcing or attempting to enforce said Ordinance No. 34 of the Series of 1914, or any part thereof, or from removing, obstructing, or in any manner molesting or interfering, for any purpose whatsoever, with said tracks maintained and operated by the plaintiff on said Wynkoop Street across said Seventeenth Street in the defendant City, or in any manner, or for any purpose molesting or interfering with this plaintiff in the exercise and enjoyment of its rights, powers, privileges and franchises in the premises pending this action, and that thereupon said injunction be made perpetual.

4. That plaintiff may have its costs in that behalf incurred.

5. That plaintiff may have such other, further or different relief in the premises as the nature of the case and equity and good conscience may require, or as to the court may seem right and just.

E. N. CLARK,

R. G. LUCAS,

Attys. for Plaintiff.

STATE OF COLORADO,

City and County of Denver, ss:

Before me Anna D. Smith, a Notary Public within and for the City and County of Denver in the State of Colorado, this day personally appeared John B. Andrews, of lawful age, to me personally known, who being by me first duly sworn on his oath deposes and says; that The Denver and Rio Grande Railroad Company, the plaintiff in the foregoing complaint, is a corporation; that he now is the Assistant to the Vice President of the Denver and Rio Grande Railroad Company; and that he now is and for many years last past has been the Assistant Secretary of said The Denver and Rio Grande Railroad Company; that he has read the foregoing complaint, and the Exhibits thereto, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes the same to be true.

JOHN B. ANDREWS.

28 In witness whereof, I have hereunto set my hand and Notarial Seal this 26th day of May, A. D. 1914.

My commission expires May 5, 1918.

[SEAL.]

ANNA D. SMITH,

Notary Public.

29

EXHIBIT "A."

"Ordinance No. 9—By Authority 1871.

An Ordinance granting the right of way to the Denver & Rio Grande R'y through and across certain streets in the City of Denver.

Section 1. Be it ordained by the City Council of the City of Denver, that the right of way be and the same is hereby granted to the

Denver and Rio Grande Railway Company to build, operate, and maintain their railway through and across certain streets hereinafter mentioned, with a single or double track.

Section 2. To build their necessary depots, turnouts, turntables, water-tanks, and side tracks, on the land now owned or that may be acquired by the said Company, and in the construction to use the alleys and streets for said purpose, when all of the lots on both sides of said streets are owned by said Company.

Section 3. The said right of way is to commence at a point twelve feet east or left, going from Denver south, of the center line of the Denver Pacific Railway track where said track leaves their depot grounds and enters Wynkoop Street, and running parallel to said Denver Pacific Railway track to the north side of G. Street; thence continuing the above tangent, which is parallel to the center of Wynkoop Street to or near the established line of Cherry Creek; thence in a curved line crossing Cherry Creek so as to enter Second Street on a tangent parallel to and six (6) feet northwest or right of the center line of said Street; thence along said tangent parallel to and six (6) feet to the right of the center of said Street to a point near the crossing of Cheyenne Avenue; thence in a curved line so located as to enter Adams Street on a tangent which shall be parallel to and six (6) feet southwest or right of the center line of said Adams Street; thence along said tangent to the point where the said Adams Street crosses or strikes the south line of the Congressional Grant or the south line of Section thirty-three (33) Town three (3) South, Range sixty-eight (68) West of the Sixth (6th) Principal Meridian.

Section 4. That in laying a double track, the second track shall be twelve (12) feet to the left going south of the above described line.

Section 5. That the said Denver and Rio Grande Railway Company shall in all cases make their grade conform to the established grade of the several streets through or across which it may construct its line, whenever the City Council may direct said Streets to be graded, except in the case of Adams Street, which from the point where the said railroad grade takes a maximum grade of fifty-two (52) feet per mile near the center of Larimer Street. From that point to the end of said street at the crossing of the south line of the above mentioned section thirty-three (33) the present established grade of the Denver & Rio Grande Railway, shall be the established grade of Adams Street.

Section 6. That the said Denver and Rio Grande Railway shall also construct and maintain good culverts at all points where the drainage of the country may require the same.

Section 7. That the said Railway Company shall plank all of the street crossings to the full length of the ties and keep said crossings in good order.

Section 8. That in crossing F. Street, the track of said railway shall conform to the present grade of this street as now graded and to enable the said Company to reach and cross Cherry Creek without

too heavy a grade, they have the privilege to cut through the bank and lay their track in the bed of Cherry Creek. In making
 31 this cut the grade at the center of the cut must be one foot above the channel of said Cherry Creek.

Section 9. That at the point where the said line cuts through the bank to enter Cherry Creek the said Denver and Rio Grande Railway Co. shall drive a row of piles on each side of the track not over eight (8) feet from the center to center, and to plank the same with two-inch plank a height four feet above the present bank, also to drive a line of wing piles at least one hundred (100) feet above and fifty (50) below their line, said wing piles to be planked up to the same height as the other piles; there shall also be a strong plank gate, so arranged that if a flood occurs in Cherry Creek it will shut said gate and insure the protection of the present banks of the creek against the flood, and in every way make the said bank of Cherry Creek as secure as it is at present.

Section 10. That in constructing the double track the said company shall have the privilege of bringing Cherry Creek with a bridge, which shall have a waterway of six feet (6) from the present bed of Cherry Creek to the bottom of the stringers of the bridge, with bents sixteen feet (16) from center to center.

Section 11. That whenever the City Council shall direct F. Street or any street to be graded to an established grade, the aforesaid Denver & Rio Grande Railway Co. shall raise their track to conform to said grade at the same time the grading on the street is done.

Section 12. That all of the track shall be laid, the culverts constructed, road crossings planked and the grading done so as to be approved by the City Engineer.

Section 13. That the said railway company shall have the right to use horse or steam or other locomotive power in the operation of their said railway within the limits of the right hereby granted; but
 32 the speed of the cars on said railway shall not be greater than five (5) miles per hour.

Section 14. That before entering upon the occupancy of said street, said railway company shall execute and deliver to the City Clerk of said City to be approved by the Mayor, a bond of said company with security running to the City of Denver in the penal sum of thirty thousand dollars (30,000) conditioned that the said company shall hold the City of Denver harmless for any and all damages that it may sustain in consequence of its granting the right and privileges herein conferred.

Approved by me this first day of June, A. D. 1871.

JOHN HARPER, *Mayor*.

Attest:

[SEAL.] JAS. GRIFFIN, *City Clerk*.

STATE OF COLORADO,

County of Arapahoe, City of Denver:

I, H. P. Parmelee, City Clerk in and for said City, hereby certify that the foregoing three (3) pages is a true copy of an ordinance

adopted by the City Council of said City on the first (1) day of June, A. D. 1871, as the same appears of record in the books of my office.

In witness whereof I have hereunto set my hand and affixed the seal of said City this 13th day of May, A. D. 1881.

[City Seal, City of Denver, Colorado. Incorp'd Nov. 7, 1861.]

(Signed)

H. P. PARMELEE,
City Clerk.

33 (In Book, Franchises and Special Privileges, as granted by the City and County of Denver, 1907, it appears that the foregoing was approved June 15, 1871.)

34 EXHIBIT "B."

By Authority.

Ordinance No. 34, Series 1914.

Commissioner Bill No. 31, Introduced by Commissioner Hunter.

A Bill for an Ordinance repealing Ordinance No. 60 of the series of 1886, and Ordinance No. 9 of the series of 1871, and Ordinance No. 7 of the series of 1886, and Ordinance No. 63 of the series of 1892, and all other ordinances or parts of ordinances in conflict herewith, and providing for the elimination of all railway tracks at the Seventeenth-street crossing where the same intersects Wynkoop street in the city and county of Denver, and providing for the removal of all said tracks at said Seventeenth-street crossing by the Denver and Rio Grande Railway Company and the Union Pacific Railway Company, or by the Commissioner of Improvements.

Be it enacted by the Council of the city and county of Denver:

Whereas, Heretofore the City of Denver, now the City and County of Denver, did, by various ordinances, grant to the Union Pacific Railway Company, and the Denver and Rio Grande Railway Company, a right to extend their respective railway tracks along Wynkoop Street and across Seventeenth Street in the City of Denver, now City and County of Denver, State of Colorado, and

Whereas, The said The Union Pacific Railway Company and The Denver and Rio Grande Railway Company have, by virtue of said grants, exercised said right or privilege, and now are so exercising said right and privilege; and

Whereas, In the opinion of the Council the further maintenance of the said tracks by said Union Pacific Railway Company and said Denver and Rio Grande Railway Company across said Seventeenth Street, where the same intersects Wynkoop Street, has become an impediment to public travel, and greatly retards the general public in its right of use of said Seventeenth Street; and

Whereas, From inspection, the use of the said crossing for the purpose for which the same was originally granted, and for which it has been used, is now wholly unnecessary to the said railway companies or either of them, and that the continuation of the use of the same for the purpose originally contemplated involves the safety of life and limb of the traveling public whose business necessitates their egress from the city or their ingress into the city; and

Whereas, The privilege of the said corporations to a right of way across said street, with its tracks and structures, was subject to the existing public right of use, and was so to be exercised as not to interfere with those for whose benefit the said Wynkoop and Seventeenth Streets in said City of Denver were originally laid out and opened;

Now therefore, be it enacted by the Council of the city and county of Denver:

Section 1. That Ordinance No. 60 of the series of 1886, and Ordinance No. 9 of the series of 1871, and Ordinance No. 7 of the series of 1886, and Ordinance No. 63 of the series of 1892, and all other ordinances or parts of ordinances be, and the same are hereby repealed, in so far as the same confers any privilege, license, right or rights claimed by or on behalf of the Union Pacific Railway Company and the Denver and Rio Grande Railway Company to maintain and continue their track or tracks across Seventeenth Street at the point where said Seventeenth Street intersects Wynkoop Street.

Section 2. That it shall be unlawful from and after the passage of this ordinance, and the taking effect thereof, for the said Denver and Rio Grande Railway Company or the said Union Pacific Railway Company, its agents, officers or representatives, to maintain and continue said tracks at the said Seventeenth Street crossing, and that they shall, within thirty days after notice, as herein provided for, remove all tracks heretofore laid by them and now existing on said Seventeenth Street at the crossing aforesaid.

Section 3. That the Commissioner of Improvements shall, upon the taking effect of this ordinance, notify the said Union Pacific Railway Company and the said Denver and Rio Grande Railway Company to remove all said track or tracks on said street at said crossing, within the time as herein provided, and that, if the said Union Pacific Railway Company and the said Denver and Rio Grande Railway Company shall refuse or neglect to remove said tracks so now maintained by them at and upon said Seventeenth Street at said crossing, then and in that case the Commissioner of Improvements is hereby empowered, authorized and directed to take such means and methods or measures as he may deem proper and necessary to remove all of said track or tracks at said point on Seventeenth Street where the same cross Wynkoop Street.

Signed and approved by me this 30th day of March, A. D. 1914.

J. M. PERKINS, *Mayor.*

Attested by the undersigned with the corporate seal of the City and County of Denver.

[SEAL.]

OTTO F. THUM,
Commissioner of Property, ex-Officio Clerk
of the City and County of Denver,
 By C. J. MOORHOUSE,
Deputy Clerk.

Published in The Denver Times this 1st day of April, A. D. 1914.

35

EXHIBIT "C."

Protest.

To the Honorable Council of the City and County of Denver:

Comes now The Denver and Rio Grande Railroad Company, a consolidated corporation organized and existing under and by virtue of the laws of the State of Colorado and of the State of Utah, and solemnly and respectfully protests against the adoption by said Council of Commissioners' Bill No. 31 "for an ordinance repealing ordinances No. 60 of the Series of 1886, and Ordinance No. 9 of the Series of 1871, and Ordinance No. 7 of the Series of 1886, and Ordinance No. 63 of the Series of 1892, and all other ordinances or parts of ordinances in conflict therewith, and providing for the elimination of all railway tracks at the Seventeenth Street crossing where the same intersects Wynkoop Street in the City and County of Denver, and providing for the removal of all said tracks at said Seventeenth Street crossing by The Denver and Rio Grande Railway Company and the Union Pacific Railway Company, or by the Commissioner of Improvements."

Your protestant, while recognizing the authority of the Council of said City and County to regulate, within reason, the use by your protestant of its track on Wynkoop Street at the intersection thereof with Seventeenth Street in said City and County, respectfully denies the authority of the Council of said City and County to remove or require the removal of the track of your protestant at said intersection.

Your protestant further declares, as it has heretofore declared, its willingness to submit to reasonable regulation of its use of said track at the intersection of said streets, and its willingness to limit its use thereof to such hours between one o'clock and six o'clock A. M., as shall cause no interference with or inconvenience to the users of said street at said intersection, and prays that the legal and equitable rights of your protestant may be shown that respect and given that protection to which the rights of citizens and residents of said City and County are lawfully entitled.

36

THE DENVER AND RIO GRANDE
 RAILROAD COMPANY,

(Signed)

By E. L. BROWN, *Vice-President.*

The foregoing protest was served on Council of the City and County of Denver, at the hour of 1:55 o'clock P. M. on the 30th day

of March, 1914, by delivering a full, true and correct copy thereof to each of the following named persons, members of said council, and to C. J. Moorhouse, Secretary and Clerk thereof, at the office of said Council, in the City Hall, in the City and County of Denver and State of Colorado.

Hon. J. M. Perkins, Commissioner of Social Welfare and Mayor.

Hon. Otto F. Thum, Commissioner of Property.

Hon. Clair J. Pitcher, Commissioner of Finance.

Hon. Alexander Nisbet, Commissioner of Safety.

Hon. John B. Hunter, Commissioner of Improvements.

Served on the above named 1:55 P. M., March 30, 1914.

(Signed)

H. A. HAVENER.

37

EXHIBIT "D."

Law Department,

I. N. Stevens,

Attorney for the City and County of Denver.

To the Denver and Rio Grande Railroad Company, its Officers, Agents and Representatives:

You are hereby notified to remove the railway or railroad tracks at the foot of 17th Street, where the same crosses Wynkoop Street, in the City and County of Denver, within thirty (30) days from the date of the service of this Notice, in pursuance with the provisions of Ordinance No. 34 of the Series of 1914, copy of which is hereto attached for the purpose of advising you of its provisions, and this Notice is given you at this time as the provisions of the Ordinance requires, said Ordinance having full force and effect on the first day of May, A. D. 1914.

Dated at Denver, Colorado, this second day of May, A. D. 1914.

(Signed)

J. B. HUNTER,

*Commissioner of Improvements,
City and County of Denver.*

(Attached to the foregoing notice was a printed copy of Ordinance No. 34 of the Series of 1914, in form identical with Exhibit "B" heretofore attached to the complaint herein.)

38 And afterwards, and on to-wit the 10th day of June, A.

D. 1914, came the defendants by their attorneys, I. N. Stevens, Esquire and George Q. Richmond, Esquire, and filed herein their Answer.

And said Answer is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Jun- 10,
1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court.

No. 57865. Div. 3.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY and COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Answer.

Comes now the defendant, the City and County of Denver, and each and all of the other defendants above named, by their attorneys, I. N. Stevens and George Q. Richmond, and answering the complaint herein, for answer thereto say:

First. Admit the allegations contained and set forth in Paragraph One of said complaint.

39 Second. Admit the allegations contained and set forth in Paragraph Two of said complaint.

Third. Admit the matters and things alleged and set forth in Paragraph Three of the said complaint.

Fourth. Admit that The Denver and Rio Grande Railway Company was duly created, organized and incorporated on the 29th day of October, A. D. 1870, under and in conformity to the laws of the Territory of Colorado, and that Articles of Incorporation were duly filed in the office of the Secretary of the said Territory of Colorado, on, to-wit, the 29th day of October, A. D. 1870, and that the term of the corporate existence of the said The Denver and Rio Grande Railway Company, was fixed at fifty years, from the said 29th day of October, A. D. 1870, the date of the filing of the said Articles of Incorporation, but deny that the said The Denver and Rio Grande Railway Company, so incorporated as aforesaid, in the manner and form as set forth in Paragraph Four of the said Complaint, was so incorporated for the purpose of locating, constructing, maintaining and operating railway and telegraph lines

along the line of Wynkoop Street, and across the intersection of said street with 17th Street, as it now exists in the City and County of Denver, or that it was at any time contemplated by the said The Denver and Rio Grande Railway Company to construct and maintain its line of railroad on Wynkoop Street, and across the intersection of Wynkoop Street with 17th Street, but these defendants admit that in and by the Articles of Incorporation the office of the said The Denver and Rio Grande Railway Company, and its principal place of business, were located and fixed in the then City of Denver, Arapahoe County, Territory of Colorado, and that said Railway Company was authorized and empowered by law to acquire all property, rights, privileges and franchises reasonably necessary or convenient to enable said Railway Company to carry on the operations named in said Articles of Incorporation.

Fifth. These defendants admit that on the 15th day of June, A. D. 1871, the then existing City Council of the City of Denver, in the County of Arapahoe, Territory of Colorado, enacted and approved an ordinance known and called Ordinance No. 9 of the Series of 1871, wherein and whereby the said City Council of the said City of Denver purported, and attempted to grant to the said The Denver and Rio Grande Railway Company, the right of way, and the right to build, operate and maintain a railway line along, over and across and through certain streets in the then City of Denver, and attempted and purported to include in the said Ordinance, the right and privilege to locate, construct, maintain and operate railway tracks along Wynkoop Street, and across 17th Street, in the then City of Denver, but these defendants expressly deny that the said ordinance became, or ever has been a valid and subsisting ordinance of the City of Denver, but on the contrary allege that the said City Council, in passing the said alleged ordinance, and the City Mayor in approving the same, acted without any power or authority whatsoever; that in and by the Charter of the City of Denver, approved November 7th, 1861, and thereafter amended, March 11th, 1864, the only authority conferred upon the City of Denver by the Incorporation Act and Charter aforesaid, relative to the streets and alleys of the City of Denver, was the authority contained in Section IX, of Article V of the said Charter or Act of Incorporation, approved November 7th, 1861, as follows: "To open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve and keep in repair the streets, avenues, lanes, side-walks, drains and sewers."

That the Legislature of the State of Colorado did not, prior to 1876, at any time, possess any authority or warrant to pass or enact Articles of Incorporation of municipal cities, and therein and thereby empower the said cities to grant rights of way through and along and across the public streets.

That in and by the organic act entitled "An Act to Provide a Temporary Government for the Territory of Colorado," adopted February 28, 1861, no power or authority is or was conferred upon the Legislative Assembly to confer or grant franchises, and rights

and privileges over, along and across the public highways of the Territory of Colorado, or of the municipalities created and existing within the then Territory of Colorado, and that the City of Denver, in and by Ordinance No. 9, of the Series of 1871, did not and could not confer the authority and power, right and privilege, by ordinance, upon The Denver and Rio Grande Railway Company, to operate and maintain its railway line upon, along, over and across and through, certain streets in said pretended ordinance set forth, and therein named, and within and by said ordinance, so, as aforesaid enacted and adopted, the said The Denver and Rio Grande Railway Company acquired no right of any kind or character.

Sixth. These defendants admit that relying upon Ordinance No. 9, of the Series of 1871, The Denver and Rio Grande Railway Company did, prior to the first day of August, 1871, construct, maintain and operate its railway track over, upon, along, through and across some of the streets of the then City of Denver, and may have, at that time, constructed, operated and maintained its railway tracks along Wynkoop Street, and where the same intersects 17th Street, as the same now exists in the City and County of Denver, but these defendants say, that the so locating, constructing, maintaining and operating this line across said 17th Street, where the same intersects Wynkoop Street was unauthorized, unwarranted, and without any authority or warrant in law by virtue of any act of the Legislative Assembly of the then Territory of Colorado, or by virtue of any ordinance of the City of Denver, or by virtue of any act of the Congress of the United States.

Seventh. These defendants deny that the said The Denver and Rio Grande Railway Company did, at any time, under and by virtue of Ordinance No. 9 of the Series of 1871, of the City of Denver, Territory of Colorado, ever acquire an irrevocable franchise to locate, lay out, construct, maintain and operate its tracks across, along, and over the various streets, including Wynkoop Street, and allege that it never was in the power of the City of Denver to grant to the said The Denver and Rio Grande Railway Company, or to any other railway company, an irrevocable right to use the streets of the said City of Denver, and these defendants deny that the said Ordinance No. 9 of the Series of 1871, was, or ever did, constitute a contract between the City of Denver and The Denver and Rio Grande Railway Company.

These defendants further allege, that the said Ordinance No. 9 of the Series of 1871, did not confer upon the said The Denver and Rio Grande Railway Company any right, power or authority to confer any rights, privileges or franchises therein, if any, conferred upon it to its successors, or to in any wise transfer and assign the same, and deny that the right of way, and the rights, powers, provisions and franchises enumerated, or pretending and purporting to be conferred by the said Ordinance No. 9, ever, at any time, vested property or a property right in the said The Denver and Rio Grande Railway Company, or any of its successors or assigns, and these defendants allege, that this plaintiff herein, The Denver and Rio Grande Railroad Company, never acquired, directly,

indirectly or legally, any vested or property right, by virtue of any transfer or assignment to it by The Denver and Rio Grande Railway Company.

43 Eighth. These defendants deny each and every allegation set forth and contained in Paragraph Eighth of the said Complaint.

Ninth. These defendants admit that on, to-wit, the 8th day of June, 1872, there was enacted by the Congress of the United States of America an act entitled "An Act granting the right of way through the public lands to The Denver and Rio Grande Railway Company", as alleged and set forth in Paragraph Ninth of said Complaint, and further admit the passage of the act of date March 3rd, A. D. 1875, by the Congress of the United States of America, as alleged and set forth in said Paragraph Nine.

These defendants further admit the passage of the act of date, March 3rd, A. D. 1877, by the Congress of the United States of America, as alleged and set forth in said Paragraph Nine of the said complaint, but these defendants allege that as to whether the said The Denver and Rio Grande Railway Company has complied with the provisions of the said Acts of Congress, these defendants have not, and cannot obtain sufficient knowledge or information upon which to base a belief, but these defendants deny that in and by the said Acts of Congress the said The Denver and Rio Grande Railway Company at any time acquired any right or authority to enter upon and to lay its tracks along, across and over the streets and alleys of the City of Denver, and especially along Wynkoop Street, and at the point where said Wynkoop Street intersects 17th Street in the City and County of Denver, now State of Colorado.

Tenth. These defendants deny each and every allegation contained and set forth in Paragraph Ten of the said Complaint.

Eleventh. These defendants admit that they have permitted and allowed the said The Denver and Rio Grande Railroad Company to continue to operate trains along Wynkoop Street, where the
44 same intersects 17th Street, but deny that they have at any time repeatedly, constantly, or in any manner or form, recognized the validity of the said Ordinance No. 9 of the Series of 1871, or that they have, by ordinance of any kind or character, ratified, confirmed and continued the said Ordinance No. 9 of the Series of 1871, in full force and effect, or that they have at any time, and by virtue of any ordinance, or in any manner, confirmed The Denver and Rio Grande Railway Company, or the plaintiff as its successor herein, in the right, power and privilege claimed by the said plaintiff, under and by virtue of Ordinance No. 9 of the Series of 1871; and these defendants further deny that the City and County of Denver has, at any time, by ordinance or otherwise, confirmed or re-enacted or ratified Ordinance No. 9 of the Series of 1871, and allege that the continuation of the railway track along Wynkoop Street and across 17th Street was suffered to be and remain without official protest up to the 30th day of March A. D. 1914.

These defendants allege that the fee of the streets and of all public highways, by whatever name known or called, of the City of Denver,

or of the City and County of Denver, from the time of its incorporation hitherto, has been and now is, vested in said City in trust for the use of the people of this state, who, at all the times before mentioned, have been and now are entitled to the free and unobstructed use and enjoyment of the same for traveling except so far as said City of Denver, in the lawful exercise of the power and authority conferred by its Charter and the several acts amendatory thereto, has granted special privileges, rights of way and easements therein and thereover, and further they allege, that any subsequent ordinance passed by the City of Denver, or the City and County of Denver, as enumerated and set forth in Paragraph Eleven in the said Complaint, did not

and could not confer any right or authority upon the plaintiff,
45 The Denver and Rio Grande Railroad Company, or The Denver and Rio Grande Railway Company, to operate and continue the use of the streets by occupying the same with its tracks, to the detriment of the public convenience and public welfare of the inhabitants of the city and County of Denver.

And further, these defendants allege, that the City of Denver, or the City and County of Denver, did not, after the adoption of the Constitution of the State of Colorado, in the year 1876, have any right, title, authority or power to pass or adopt any ordinance granting an irrevocable right to the use of the streets of the City of Denver, or the City and County of Denver, and that any such ordinance was in violation of the Constitution of the State of Colorado, and was not at any time authorized by the Charter of the City of Denver, or the City and County of Denver, and that any such ordinance did not, and could not, have the effect or perform the purposes as alleged in the complaint herein; and these defendants further allege that any and all of such ordinances enumerated and set forth in Paragraph Eleven of the said Complaint, and the provisions thereof, were and are, in violation of the provisions of the Constitution of the State of Colorado, and particularly of Section XI of Article II thereof.

Twelfth. These defendants admit that the said track along Wynkoop Street, and within the limits of the intersection of said Wynkoop Street and 17th Street, was a part of the original main line of The Denver and Rio Grande Railway Company, and that it was laid for the purpose in hand by Paragraph Twelve of the said Complaint set forth, and particularly for its main passenger track and for passenger business, but, these defendants say that the same has long since been abandoned by The Denver and Rio Grande Railway Company and The Denver and Rio Grande Railroad Company as its main line
of track, and for passenger business, and that it has not used
46 the said track, along Wynkoop Street for thirty-four years last past as its main line or for passenger business, but on the contrary has converted the same into a freight switch for the sole, only and unnecessary purpose of switching freight cars.

These defendants admit that numerous industries have been built up along said Wynkoop Street, between 17th Street and 19th Street, but deny that the same were so built up in reliance upon the continued operation across said 17th Street, and along said Wynkoop Street

of the track of The Denver and Rio Grande Railway Company or the track of The Denver and Rio Grande Railroad Company, and deny that the same is necessary to be continued and operated as a means or an aid to the numerous industries so alleged to have been built up along said Wynkoop Street, and deny that the said plaintiff as successor of The Denver and Rio Grande Railway Company, or any of the industries along said Wynkoop Street, will, by reason of the removal of the tracks across 17th Street, where the same intersects Wynkoop Street, in any wise suffer, or that the same is essential or necessary to the industries above mentioned for loading and unloading, or picking up cars, loaded or unloaded thereat, or that the said industries, or the plaintiff herein, are entitled to continue the same as a mere accomodation to itself and the said industries, and deny that the said track at the point named in said Ordinance No. 34 Series of 1914, recited and set forth in the plaintiff's complaint, has for forty years, or has for the last thirty years, been a part of the main line, or in any wise utilized, or that the same was ever an integral part or parcel of the main railway system of the said plaintiff company, or the said The Denver and Rio Grande Railway Company, or that the maintaining and using of said tracks, at the said crossing of said 17th Street, is maintained and used in and for the transportation of persons and property between Colorado and the several other states and Territories of the United States and the District of Columbia and foreign countries, and on the contrary, these defendants allege that the said 17th Street, where the same intersects Wynkoop Street, is the street leading to the Union Passenger depot in the City and County of Denver, State of Colorado, and is the main thoroughfare to said Union Passenger Depot, and that said depot is the terminal of six lines of railroads and four additional lines of railroad and railway, operating passenger trains or equipment into and out of the City and County of Denver, and that there are approximately seventy-five passenger trans entering the said Union Passenger Depot each and every day and approximately seventy-five passenger trains leaving said Union Passenger Depot each and every day, with their quota of passengers, and that the average number of persons using 17th Street and crossing Wynkoop Street in their passage to and from the said Union Depot daily is approximately the number of twenty-five hundred persons, and that said travel to and from said Union Depot continues at all hours of the day and night, and that said crossing is also necessary for the transportation of people by vehicles and automobiles and the transportation of baggage of passengers going to and from said depot, and that on festival days and Sundays the traffic across said Wynkoop Street on 17th Street reaches in numbers ten thousand, and on many occasions, these defendants are informed, exceeds that number and that the utilization of said crossing by the said plaintiff, or any railroad or railway company for the purpose of switching freight cars or the passage of switch engines during any hour of the day or night, is a menace to human life, is an inconvenience of great moment to the general traveling public, and infringes the general welfare of the cit-

izens and inhabitants of the City and County of Denver and others sojourning therein and their right to the free, clear and unobstructed use of the public streets aforesaid.

48 That the said maintaining of the said tracks at said crossing, is a nuisance and ought to be abated as in and by said Ordinance No. 34 Series of 1914, the Council of the City and County of Denver has provided, or should be declared to be a nuisance and abated by a decree of this Honorable Court.

These defendants deny that it will be impossible for the plaintiff to serve its patrons, or the so-called industries, along Wynkoop Street, between 17th and 19th Streets, if the said tracks at the crossing of 17th Street be removed. On the contrary, these defendants allege that before the passage and adoption of the said Ordinance No. 34 of the Series of 1914, they caused inquiry to be made of the conditions existing in said locality, and of the necessity for the maintenance of the said track at the said point, and were advised by the officials of other Railroad Companies that the maintenance of the said tracks at the said point was not essential to the business traffic and business relations of the said plaintiff company, and that at a nominal expense and without injury to its general business, or injury to the business of the people who are conducting warehouses and other enterprises along said Wynkoop Street, between 17th and 19th Streets, the said The Denver and Rio Grande Railroad Company provide facilities, means and methods of switching its freight cars so that the business of the said industries along said Wynkoop Street would not be interfered with or damaged.

Thirteenth. The defendants further allege that it is impossible for the City and County of Denver, by ordinance or contract to provide for the use of the said crossing by the said The Denver and Rio Grande Railroad Company, at certain hours of the day and night, because they say that trains are arriving and going to and from the said Union Depot at all hours, some of the said trains
49 reaching the said union passenger depot on schedule time, between the hours of 5:00 P. M. and 3:00 A. M. of the following day, and that more frequently many of the said trains are delayed in reaching the said Denver Union Depot and the hours of their arrival and the discharge of their passengers are extremely uncertain, and that to attempt to fix certain hours for the switching of cars across said 17th Street would greatly impede traffic to and from said Union Passenger Depot, through and under the "Welcome Arch," therein located, and would prove a menace to human life and a general nuisance to the traveling public.

These defendants deny that the removal of the said track, as in and by said Ordinance No. 34, of the Series of 1914, so directed, would occasion an irreparable injury to the plaintiff, or that any damages that might accrue to said plaintiff are not susceptible of definite admeasurement, or that the removal thereof would impair the contract rights of the plaintiff, or are in any wise in violation of the Constitution of the United States or of the State of Colorado, and that to remove the said track these defendants deny would be the taking of the property of this plaintiff without due process of law,

without due compensation, and in violation of any provision of the Constitution of the United States, or of the Constitution of the State of Colorado, or that it would be a denial to the plaintiff of the equal protection of the laws, or in violation of the Constitution of the United States or of the Constitution of the State of Colorado, and these defendants deny that the removal of the said track would impose an onerous burden upon and constitute an illegal interference with the interstate commerce, traffic and business of the plaintiff, or be in violation of the interstate commerce clause of the Federal Constitution, or in any wise impair the contract or any contract created between the defendants and The Denver and Rio Grande Railway

50 Company, or between the plaintiff and the defendants, or between the defendant, the City and County of Denver and The Denver and Rio Grande Railway Company.

The defendants admit the passage of the Ordinance No. 34 Series of 1914, as in and by said Paragraph Thirteen of the said complaint is alleged and set forth, and admit that the said plaintiff did protest against its introduction and passage, and admit that the said plaintiff, through its officials, made the proposition to use the said track at certain hours of the day, but these defendants say that the public interests, the general welfare, the rights of the traveling public, due regard for human life, forbid and prohibit them from entering into any contract or contracts with the said plaintiff for the continuance and maintenance of the said track at the said crossing aforesaid.

Fourteenth. These defendants deny each and every allegation alleged and contained and set forth in Paragraph Fourteen of the said plaintiff's complaint.

Fifteenth. These defendants deny each and every allegation contained and set forth in Paragraph Fifteen of the said plaintiff's complaint.

These defendants deny that the said ordinance deprives, or would, if enforced, deprive the plaintiff herein of its property without due process of law, or would at all deprive it of any property owned by, or to which it is entitled at the present time, and deny that the passage thereof is an attempt to take the property of the plaintiff or any other person, company or corporation, or that it will impair the obligation of any contract between the City of Denver, or the City and County of Denver, and the plaintiff, or any contract whatsoever.

And these defendants deny that there is on the part of the City and County of Denver, or any of the defendants herein, or any of them, any purpose or desire whatsoever to injure or in any
51 manner affect any of the rights, property, or lawful privileges of the plaintiff company, or any of its predecessors in interest, or the plaintiff, or any parties in any manner connected with the said plaintiff company, and expressly deny that there is any plan or scheme or combination or purpose of the defendants herein, or any of them, to in any manner affect the just and proper administration of the business of the said plaintiff company, but on the contrary allege that the passage of the said ordinance is solely to protect the just, proper and the best interests of the City and County of Denver, and all of the citizens thereof, having due regard to all the rights of

the plaintiff herein, and of all persons in any manner connected with, or associated in a business way, directly or indirectly, with the plaintiff herein.

And these defendants further deny that the plaintiff has no adequate remedy at law, or that the defendants herein, to-wit, the City and County of Denver and each and all of the Commissioners thereof, constituting the Council of the City and County of Denver are insolvent, but on the contrary allege that the City and County of Denver is amply able and willing to pay all of its just debts or judgments which it has incurred or may hereafter incur, by reason of the removal of the said track, under and by virtue of the provisions of the said Ordinance No. 34 of the Series of 1914, and defendants allege that it is necessary to enforce the said Ordinance No. 34 of the Series of 1914, for the protection of the interests of the City and County of Denver and its inhabitants, and that the defendants should be permitted to exercise the discretion lawfully vested in them, and to enforce the said Ordinance as to them shall seem right and proper.

And these defendants further submit to this Honorable Court that the plaintiff has not, in and by its complaint, shown any case in equity, or any case entitling it to proceed against the defendant,

52 the City and County of Denver, or the defendants, or any of them, in this Honorable Court, and pray that they may have the same benefit of this defense as if they had demurred to the plaintiff's bill of complaint.

These defendants deny all and all manner of unlawful combination and confederacy wherewith they or any of them, are, by the said complaint charged, without this, that there is any other matter, cause or thing in the plaintiff's said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge and belief of each and all of these defendants; all of which matters and things in this answer set forth, these defendants are willing to aver, maintain and prove, as this Honorable Court shall direct, and these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

I. N. STEVENS,
GEO. Q. RICHMOND,
JACOB J. LIEBERMAN,
Attorneys for Defendants.

STATE OF COLORADO,
City and County of Denver, ss:

On this 10th day of June, A. D. 1914, before me personally appeared John B. Hunter one of the defendants herein and made oath:

That he has read the above and foregoing Answer, subscribed by him, and knows the contents thereof, and that the matters and things therein alleged and set forth are true of his own knowledge, except

as to such matters and things therein stated to be on information and belief, and as to those matters he believes them to be true.

J. B. HUNTER.

53 Subscribed and sworn to before me, William A. Reef, a Notary Public within and for the City, County and State hereinabove named, this 8th day of June, A. D. 1914.

My commission expires March 29, A. D. 1917.

[SEAL.]

WILLIAM A. REEF,
Notary Public.

54 And afterwards, and on to-wit the 20th day of June, A. D. 1914, came the plaintiff herein and filed its Replication. And said Replication is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Jun- 20, 1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. No. 3.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation; J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Replication.

Comes now the above named plaintiff, The Denver and Rio Grande Railroad Company, and replying to the answer of the defendants herein, and for its replication to such answer, says and alleges:

I.

Answering the allegations in paragraph Fifth of said answer, plaintiff denies that the only authority conferred upon the City of Denver by the Incorporation Act and Charter in said answer referred to relative to the streets and alleys of the City of Denver was the authority in said paragraph in said answer

set forth; and plaintiff denies that the Legislature of the State of Colorado did not prior to 1876 at any time possess any authority or warrant to pass or enact articles of incorporation of municipal cities and thereby empower the said cities to grant rights of way through and along and across the public streets, as in said Fifth paragraph of said answer alleged; but, on the contrary, alleges that such Legislature did have the power so to do; and plaintiff further denies that in and by the Organic Act, and in said paragraph of said said answer referred to, no power or authority is or was conferred, as therein set forth; and alleges that on the contrary power and authority is and was therein and thereby conferred upon the Legislative Assembly to confer or grant franchises and rights and privileges through and along and across the public highways of the Territory of Colorado and of the municipalities created and existing within the then Territory of Colorado.

II.

Answering the allegations of paragraph Sixth of said answer, this plaintiff denies that its construction of said track on said Wynkoop Street and said Seventeenth Street, as in said answer set forth and in the complaint alleged, was unauthorized, unwarranted and without any authority or warrant of law, as in said answer alleged; and, on the contrary, alleges that said construction of said track was authorized, warranted and with authority and warrant in law by virtue of the acts of the Legislative Assembly of the then Territory of Colorado and by virtue of the ordinances of the City of Denver and by virtue of the Acts of Congress of the United States in said complaint set forth.

III.

56 Answering the allegations of paragraph Seventh of said answer, plaintiff denies that said Ordinance of 1871 did not confer upon The Denver and Rio Grande Railway Company the right, power and authority to transfer and assign the rights and privileges thereunder as in said answer alleged; and, on the contrary, alleges that it did confer upon said The Denver and Rio Grande Railway Company the right, power and authority to confer the rights, privileges and franchises therein conferred upon it to its successors and to the plaintiff.

IV.

Plaintiff denies that the use of the tracks by it in question is or was in any way unnecessary, as set forth in the Twelfth paragraph of said answer; and further answering the Twelfth paragraph of said answer, plaintiff denies that the average number of persons using said Seventeenth Street and crossing Wynkoop Street, as in said answer set forth, is approximately 2,500 persons or anything like that number, as in said answer set forth; and denies that said travel to and from said Union Station continues at all hours of the day and

night; and, on the contrary, says that said travel is almost entirely limited to the daylight hours or the early evening hours and is spasmodic and periodical; and plaintiff denies that on festival days and Sundays the traffic in said answer referred to reaches the number of 10,000 or anything like that number of persons; and plaintiff denies that its use of the tracks in question is a menace to human life or is an inconvenience of any great moment to the general traveling public or to any one else; and denies that its user of said tracks infringes upon the general welfare of the citizens and inhabitants of the City and County of Denver or any one else or any one sojourning therein, as in said answer alleged; and plaintiff denies that the maintaining and use of its said tracks by it is or ever has been a nuisance and ought to be abated, as in said answer set forth; and further

57 answering said paragraph of said answer, plaintiff denies that the defendants, before the passage and adoption of said Ordinance of 1914, in said answer referred to, caused the inquiry therein mentioned to be made, or any inquiry; and denies that the defendants or any of them were advised by the officials of this plaintiff, or any officer, agent or official of this plaintiff that the maintenance of said track at the point in said answer mentioned was not essential to the business traffic and business relations of this plaintiff Company; and denies that the defendants were informed that at a nominal expense and without any injury to its general business, or any injury to and business of conducting warehouses and other enterprises along said Wynkoop Street between Seventeenth and Nineteenth Streets, the plaintiff Company could provide facilities, means and methods of switching its freight cars so that the business of the said industries would not be interfered with or damaged, as in said answer set forth; and denies that such is the fact or facts.

V.

Answering the allegations of paragraph Thirteenth of said answer, plaintiff denies that it is impossible for the City and County of Denver by Ordinance, contract or otherwise to provide for the use of said crossing by the plaintiff Company at certain hours of the day and night, for the reasons in said answer set forth; and alleges that on the contrary it is not only possible for the City and County of Denver to do so, but that it is reasonable and just that it should do nothing else; and plaintiff denies that an attempt to fix certain hours for the switching of cars across said Seventeenth Street would impede the traffic to and from the Union Station or would prove a menace to human life and a general nuisance to the traveling public, as in said answer set forth.

58

VI.

Plaintiff denies each and every allegation of new matter, and all new matter in said answer contained not hereinbefore specifically admitted or denied.

E. N. CLARK,
R. G. LUCAS,
Attorneys for Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Before me Anna D. Smith, a Notary Public within and for the City and County of Denver in the State of Colorado, this day personally appeared John B. Andrews of lawful age to me personally known, who being by me first duly sworn on his oath deposes and says: That The Denver and Rio Grande Railroad Company, the plaintiff in the foregoing replication, is a corporation; that he is now the Assistant to the Vice-President of The Denver and Rio Grande Railroad Company; and that he now is and for many years last past has been the Assistant Secretary of said The Denver and Rio Grande Railroad Company; that he has read the foregoing replication and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes the same to be true.

JOHN B. ANDREWS.

In witness whereof I have hereunto set my hand and Notarial Seal this 20th day of June A. D. 1914.

My Commission expires May 5, 1918.

[SEAL.]

ANNA D. SMITH,
Notary Public.

59 And afterwards, and on to-wit the 5th day of September, A. D. 1914, came the plaintiff by its attorneys, and filed herein its Amendment to Replication.

And said Amendment to Replication is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Sep. 5, 1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Division 3.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation et al.,
Defendants.

Amendment to Replication.

Comes now the plaintiff in the above entitled cause, by its attorneys, and as an amendment to its replication herein filed, and

in response to the amendment to the answer herein and in reply thereto says:

Plaintiff denies the allegations in said amendment to said answer, and further says that any breach of any condition under Section 2 of said ordinance No. 9 of the series of 1871 has been waived by defendants and their predecessors in office and interest.

E. N. CLARK,
R. G. LUCAS,
Attorneys for Plaintiff.

60 Received copy of foregoing September 5th, 1914.

I. N. STEVENS,
GEO. Q. RICHMOND,
JACOB J. LIEBERMAN,
Attorneys for Defendants.

61 And afterwards, and on to-wit the 16th day of September, A. D. 1914, came the defendants and filed herein their Amendment to Answer.

And said Amendment to Answer is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Sep. 16, 1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. III.

No. 57865.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, et al.,
Defendants.

Amendment to Answer.

Come now the defendants in the above entitled cause of action, by their attorneys, and as an amendment to their answer in this action heretofore filed, add the following to the end of the 6th paragraph of their said answer, to-wit:

"But defendants deny that the plaintiff or its predecessor duly complied with, or complied with at all, and deny that said plaintiff, or its predecessor, duly performed, or performed at all, all or any of the terms, covenants, conditions and obligations by it to be performed under section 2 of the provisions of Ordinance No. 9 of

the Series of 1871, and defendants allege that neither said plaintiff nor its predecessor, at any time since the *the* passage of the aforesaid ordinance, owned, or now own, or had any title in or
 62 to, or any interest in or to the property, or any thereof, on either side of the aforesaid Wynkoop Street, where the track of the plaintiff railroad company was built and now lies on said street, and failed, and in every respect failed, to comply with or perform the conditions precedent set forth and named in Section 2 of the aforesaid Ordinance Number Nine of the Series of 1871."

I. N. STEVENS,
 GEO. Q. RICHMOND,
 JACOB J. LIEBERMAN,
Attorneys for Defendants.

63 And afterwards, and on to-wit the 22nd day of October, A. D. 1914, the following further proceedings, inter alia, were had and entered of record in said court, to-wit:

No. 57865.

THE DENVER & RIO GRANDE RAILROAD COMPANY, etc.,

vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

At this day come the parties hereto, by their attorneys, respectively, and thereupon leave is granted to defendants to file an amendment to replication, nunc pro tunc as of August 27, 1914.

No. 57865.

THE DENVER & RIO GRANDE RAILROAD COMPANY, etc.,

vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

At this day come the parties hereto, by their attorneys, respectively, and thereupon leave is granted to plaintiff to file amendment to replication, nunc pro tunc as of August 27, 1914.

64 And afterwards, and on to-wit the 13th day of November, A. D. 1914, came the plaintiff by its attorneys, and filed herein its Requests for Findings of Fact and Conclusions of Law.

And said Requests for Findings of Fact etc. *is* as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Nov. 13,
1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,

City and County of Denver, ss:

In the District Court, Division 3.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Plaintiff's Requests for Findings of Fact and Conclusions of Law.

Comes now The Denver and Rio Grande Railroad Company, the above named plaintiff, by its attorneys, and respectfully prays and requests the Court to make and enter of record and file herein the following findings of fact and conclusions of law, to-wit:

65 Filed in District Court, City & County of Denver, Colo., Nov. 13, 1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Division 3.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Findings of Fact and Conclusions of Law.

This cause coming on for trial at the April, 1914, term of said Court and having been tried to and before the Court, the parties being represented and appearing by their respective counsel; and after hearing the allegations and proofs of the parties, and the arguments of counsel, and having considered the same, and being fully advised in the premises, the Court doth make and enter of record and file herein the following findings of fact and conclusions of law, to-wit:

66 Finding of Fact Number One.

That the above named plaintiff, The Denver and Rio Grande Railroad Company, is, and ever since the 27th day of July, A. D. 1908, has continuously been a consolidated corporation duly organized, created and existing under and by virtue of the laws of the State of Colorado and of the State of Utah.

Finding of Fact Number Two.

That the above named defendant, the said City and County of Denver (hereinafter, for brevity, sometimes called the "Defendant City"), is, and ever since the first day of December, A. D. 1902, has been a body politic and corporate and a municipal corporation located and existing in the State of Colorado under and by virtue of and created under and by virtue of Article XX of the Constitution of the State of Colorado, and as such said defendant City has, among other

powers, that of suing and defending, pleading and being impleaded in all courts and places and in all matters and proceedings by that name; that under and by virtue of the charter of said defendant City adopted March 29, A. D. 1904, as amended by the amendments thereto adopted on February 14, A. D. 1913, all legislative powers possessed by said defendant City, except as in said charter otherwise specifically provided since said last mentioned date, have been and are vested in a council of five Commissioners therein designated as follows, to-wit: Commissioner of Social Welfare, Commissioner of Finance, Commission of Safety, Commissioner of Improvements, and Commissioner of Property; that on March 1, A. D. 1904, the defendant, J. M. Perkins, was, and since then continuously has been, and now is the duly elected qualified and acting Commissioner of

67 Social Welfare and Mayor of said defendant City; that on March 1, A. D. 1914, the defendant, Clair J. Pitcher, was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Finance of said defendant City; that on March 1, A. D. 1914, the defendant, Alexander Nisbet, was, and since then continuously has been, and now is the duly elected, qualified, and acting Commissioner of Safety of said defendant City; that on March 1, A. D. 1914, the defendant, John B. Hunter, was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Improvements of said defendant City; that on March 1, A. D. 1914, the defendant, Otto F. Thum, was, and since then continuously has been, and now is the duly elected, qualified and acting Commissioner of Property of said defendant City; and that said defendants, J. M. Perkins, Clair J. Pitcher, Alexander Nisbet, John B. Hunter and Otto F. Thum, were, on March 1, A. D. 1914, and long prior thereto had been, and since then have continuously been, and now are citizens of the United States of America, and citizens and residents of the said City and County of Denver and State of Colorado.

Finding of Fact Number Three.

That prior to the adoption of Article XX of the Constitution of the State of Colorado, on the first day of December, A. D. 1902, there existed a duly created, organized and chartered Municipal Corporation located in the County of Arapahoe, in the State of Colorado, and known as the City of Denver, and under and by virtue of said Article XX of the Constitution of the State of Colorado, and the amendments thereto, said Municipal Corporation, formerly known as the City of Denver, in said Arapahoe County, Colorado, together with certain other municipal corporations and quasi-municipal corporations in said Article XX of the Constitution of the

68 State of Colorado enumerated, were thereby consolidated and declared to be a single body politic and corporate by the name of the "City and County of Denver," which said City and County of Denver is the defendant City herein; and it was, and is expressly provided in and by said Article XX of the Constitution of the State of Colorado, that said defendant City shall and did succeed to all

the rights and liabilities and assumed all the obligations of said municipal corporation formerly known as the City of Denver in said Arapahoe County.

Finding of Fact Number Four.

That The Denver and Rio Grande Railway Company, one of the predecessors in interest of this plaintiff, was duly created, organized and incorporated on the 27th day of October, A. D. 1870, under and in conformity to the laws of the then Territory of Colorado; and its Articles or Certificate of Incorporation were duly filed in the office of the Secretary of the said Territory of Colorado, on said 29th day of October, A. D. 1870; and that in and by said Articles or Certificate of Incorporation, so filed as aforesaid, the term of the corporate existence of said The Denver and Rio Grande Railway Company was fixed at fifty years from the said date of said filing of said Articles or Certificate of Incorporation; and the business of said The Denver and Rio Grande Railway Company, expressed in said Articles or Certificate of Incorporation, so filed as aforesaid, was to locate, construct, maintain and operate certain railway and telegraph lines therein described; and in and by said Articles of Certificate of Incorporation, the principal place of business of said The Denver and Rio Grande Railway Company was located and fixed at said former City of Denver, Arapahoe County, State of Colorado; and said Railway Company was authorized and empowered by law to acquire all property, rights, privileges and franchises reasonably necessary or convenient to enable said Railway Company to carry on the operations named in said Articles or Certificate of Incorporation. Among the lines of railway which said The Denver and Rio Grande Railway Company was, by its said certificate of incorporation, authorized to construct, were the following, viz: The Denver and Rio Grande Railway, The Denver and Southern Railway, The South Park Railway, The Western Colorado Railway, The Morena Valley Railway, The San Juan Railway, The Gallesto Railway, and The Santa Rita Railway. The general route of each line was designated in the articles of incorporation. That of the main line—The Denver and Rio Grande Railway—was as follows:

“Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte River, on the southeast side thereof to a point at or near the mouth of Plum Creek; thence up the valley of Plum Creek, to a point at or near the forks of East Plum Creek and West Plum Creek; thence up the main east branch of Plum Creek Valley to the lake in township 11, range 67 west, on the east of the ridge dividing the waters of Plum Creek and Monument Creek; thence down the valley of Monument Creek to a point at or near the junction of the valleys of the Monument and Fountain qui bouille, or to a point in the Fountain Valley, below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible; thence by the valley of the Fountain or across its west tributaries to such a point on the Arkansas River at or above Pueblo as may be found upon a detailed survey to be the most eligible for

intersecting the same; thence up the valley of the Arkansas to a point at or near Cañon City; thence continuing up the valley of the Arkansas through the Big Canon of the same to a point at or near the mouth of the Arkansas River; thence by the valleys or the adjoining slopes of the Arkansas River and of Pueblo Creek
 70 to the summit of the divide between the waters of the Arkansas and the San Luis Park (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis Valley to the valley of the Rio Grande del Norte; thence in a general southerly direction, by the particular route which may be determined upon by a detailed survey to be most eligible, down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river, as may be found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the Republic of Mexico."

The remaining seven roads were intended to be branches or feeders of the main line.

Finding of Fact Number Five.

That heretofore, and on, to-wit, the 15th day of June, A. D. 1871, the then City Council of said the City of Denver, in said County of Arapahoe, in the State of Colorado (one of the constituent corporations of the defendant City, as aforesaid), passed, enacted, adopted and approved an ordinance known as Ordinance No. 9 of the Series of 1871, entitled "An Ordinance Granting the Right of Way to The Denver and Rio Grande Ry. through and across certain streets in the City of Denver," wherein and whereby it was and is provided as follows:

"Section 1. Be it ordained by the City Council of the City of Denver, that the right of way be and the same is hereby granted to the Denver and Rio Grande Railway Company to build, operate, and maintain their railway through and across certain streets hereinafter mentioned, with a single or double track.

"Section 2. To build their necessary depots, turnouts, turntables, water-tanks, and side tracks, on the land now owned or that
 71 may be acquired by the said Company, and in the construction to use the alleys and streets for said purpose, when all of the lots on both sides of said streets are owned by said Company.

"Section 3. The said right of way is to commence at a point twelve feet east or left, going from Denver south, of the center line of the Denver Pacific Railway track where said track leaves their depot grounds and enters Wynkoop street, and running parallel to said Denver Pacific Railway track to the north side of G. Street; thence continuing the above tangent, which is parallel to the center of Wynkoop street to or near the established line of Cherry Creek; thence in a curved line crossing Cherry Creek so as to enter Second Street on a tangent parallel to and six (6) feet northwest or right of the center line of said street; thence along said tangent parallel

to and six (6) feet to the right of the center of said street to a point near the crossing of Cheyenne Avenue; thence in a curved line so located as to enter Adams street on a tangent which shall be parallel to and six (6) feet southwest or right of the center line of said Adams Street; thence along said tangent to the point where the said Adams street crosses or strikes the south line of the Congressional Grant or the south line of section thirty-three (33) Town three (3) South, Range sixty-eight (68) West of the Sixth (6th) Principal Meridian.

"Section 4. That in laying a double track, the second track shall be twelve (12) feet to the left going south of the above described line.

"Section 5. That the said Denver and Rio Grande Railway Company shall in all cases make their grade conform to the established grade of the several streets through or across which it may construct its line, whenever the City Council may direct said streets to be graded, except in the case of Adams street, which from the point where the said railroad grade takes a maximum grade of fifty-

72, two (52) feet per mile near the center of Larimer street. From that point to the end of said street at the crossing of the south line of the above mentioned section thirty-three (33) the present established grade of the Denver & Rio Grande Railway shall be the established grade of Adams Street.

"Section 6. That the said Denver and Rio Grande Railway shall also construct and maintain good culverts at all points where the drainage of the country may require the same.

"Section 7. That the said Railway Company shall plank all of the street crossings to the full length of the ties and keep said crossings in good order.

"Section 8. That in crossing F street, the track of said railway shall conform to the present grade of this street as now graded and to enable the said company to reach and cross Cherry Creek without too heavy a grade they have the privilege to cut through the bank and lay their track in the bed of Cherry Creek. In making this cut the grade at the center of the cut must be one foot above the channel of said Cherry Creek.

"Section 9. That at the point where the said line cuts through the bank to enter Cherry Creek the said Denver and Rio Grande Railway Co. shall drive a row of piles on each side of the track not over eight (8) feet from the center to center, and to plank the same with two-inch plank a height four feet above the present bank, also to drive a line of wing piles at least one hundred (100) feet above and fifty (50) below their line, said wing piles to be planked up to the same height as the other piles; there shall also be a strong plank gate, so arranged that if a flood occurs in Cherry Creek it will shut said gate and insure the protection of the present banks of the creek against the flood and in every way make the said bank of Cherry Creek as secure as it is at present.

73 "Section 10. That in constructing the double track the said company shall have the privilege of bridging Cherry creek with a bridge, which shall have a water-way of six feet (6)

from the present bed of Cherry Creek to the bottom of the stringers of the bridge, with bents sixteen feet (16) from center to center.

"Section 11. That whenever the city council shall direct F street or any street to be graded to an established grade, the aforesaid Denver & Rio Grande Railway Co. shall raise their track to conform to said grade at the same time the grading on the street is done.

"Section 12. That all of the track shall be laid, the culverts constructed, road crossings planked and the grading done so as to be approved by the city engineer.

"Section 13. That the said railway company shall have the right to use horse or steam or other locomotive power in the operation of their said railway within the limits of the right hereby granted; but the speed of the cars on said railway shall not be greater than five (5) miles per hour.

"Section 14. That before entering upon the occupancy of said street, said railway company shall execute and deliver to the city clerk of said City to be approved by the Mayor, a bond of said Company with security running to the City of Denver in the penal sum of thirty thousand dollars (\$30,000) conditioned that the said company shall hold the City of Denver harmless for any and all damages that it may sustain in consequence of its granting the right and privileges herein conferred."

Finding of Fact Number Six.

That immediately upon the passage and enactment of said Ordinance No. 9 of the Series of 1871, above mentioned,
74 said The Denver and Rio Grande Railway Company, predecessor in interest of this plaintiff, duly accepted the provisions of said Ordinance No. 9 of the Series of 1871, and acting upon the faith thereof, and in reliance thereupon, immediately, and at a great expenditure of time, labor and money, proceeded to, and did, prior to the first day of August, A. D. 1871, locate, construct, maintain and operate its railway track and lines over, upon, along, through and across certain streets and the right of way in said Ordinance No. 9 of the Series of 1871, mentioned and described, including said Wynkoop Street and said 17th Street, and on or before said last mentioned date, did locate, construct, maintain and operate its railway track along Wynkoop Street and across 17th Street in the said former City of Denver, now the defendant City; and said Railway Company duly complied with and performed all the terms, covenants, conditions and obligations by it to be performed under the provisions of said Ordinance No. 9 of the Series of 1871, and the successors in interest of said Railway Company, including this plaintiff, have at all times complied with and performed all the terms, covenants, conditions and obligations by them to be performed under said Ordinance No. 9 of the Series of 1871, and defendants made no contention or claim to the contrary, except as to the provisions of section 2 of said Ordinance No. 9 of the Series of 1871, and in this connection, the above named plaintiff company does not own, has no title in or to, or any interest in or to, nor has it since the

passage of Ordinance No. 9 of the Series of 1871, owned, had any title in or to, or in or to any of the property on either side *on* Wynkoop street where the tracks or track of said plaintiff company now lie, on said Wynkoop Street, except such interest as may be vested in the said plaintiff company by its being a member or stockholder of The Union Depot Terminal Railway Company, or its successor, which is the owner of some of the property on the westerly side
75 of and abutting upon said Wynkoop Street, where said plaintiff's track is, or said plaintiff's tracks are, laid; that the northeast corner of 18th Street is owned by the Littleton Creamery Company; the east corner of 18th Street is owned by the McPhee and McGinnity Lumber Company; the west corner of 18th Street is owned by the Union Depot; and the southwest corner is owned by the J. S. Brown Bros. Mercantile Company; the east corner of 17th Street and Wynkoop Street is owned by the Hendrie and Bolthoff Manufacturing Company; the south corner of 17th Street is owned by the Estabrook Mercantile Company; the north and west corners of 17th Street are owned by the Union Depot; the east corner of 16th Street and Wynkoop Street is owned by the Barteldes Seed Company; the south corner of 16th Street by the C. S. Morey Mercantile Company.

All of this property abuts on Wynkoop Street over which the railroad tracks of the plaintiff are laid and constructed.

Finding of Fact Number Seven.

That this plaintiff is the legal and equitable successor in interest to, and the owner and possessor of all and singular the property, real, personal and mixed, and the rights, powers, privileges and franchises of every kind and character whatsoever heretofore owned or possessed or in any manner vested in said The Denver and Rio Grande Railway Company, the predecessor in interest of this plaintiff, including all the right, title, interest, estate, property, franchise and privilege of said The Denver and Rio Grande Railway Company, of, in and to and with respect to said Ordinance No. 9 of the Series of 1871.

Finding of Fact Number Eight.

76 That on January 1, 1880, said The Denver and Rio Grande Railway Company made, executed and delivered to certain trustees therein named, its certain deed of trust in the nature of a mortgage, bearing date that day, wherein and whereby for good and sufficient consideration and to secure the payment of certain bonds thereunder issued and the interest thereon, granted, bargained, sold, alienated, transferred, assigned, conveyed and confirmed unto said trustees, their successors, survivors, heirs and assigns forever, all the right, title, interest, claim and demand whatsoever which said Railway Company had or was entitled to in the property described therein, including the line of railway which it had heretofore constructed and operated along said Wynkoop Street, and from Denver southward to Colorado Springs, to Pueblo, etc., together with all the lands, tenements and hereditaments acquired or appropriated for the

purpose of a right of way for said railway line, and all the easements and appurtenances thereunto belonging or in anywise appertaining, and all the railways, ways, rights of ways, depot grounds, tracks and other structures which said company had acquired for or in respect to the locating, constructing, operating, renewing, repairing, replacing and maintaining said railway or any part thereof or convenient or necessary for use for the purposes of said railway, together with all franchises of said company of any and every nature relating thereto, including the rights, powers, privileges and franchises granted to and conferred upon said company under and by virtue of the Acts of Congress in the complaint set forth, and together with all and singular the endowments, income and advantages, tenements, hereditaments and appurtenances to said railway belonging or in anywise appertaining. Default having been made in the payment of the interest on the bonds so secured by said mortgage or deed of trust, and having continued for a sufficient length of time to mature by the terms of said instrument the principal and interest of said bonds, foreclosure proceedings were duly had in the Circuit Court of

77 the United States for the District of Colorado, resulting in a decree of foreclosure and sale of all the property of said The Denver and Rio Grande Railway Company subject to said deed of trust of January 1, 1880. Accordingly, certain special commissioners under said decree acting, and also said trustees acting in execution of the power of sale conferred upon and vested in them under and by virtue of the provisions of said deed of trust on July 15, 1886, duly bargained, granted, sold and conveyed all and singular the property and premises and franchises conveyed by said deed of trust, as did also said The Denver and Rio Grande Railway Company by a separate deed of conveyance, unto The Denver and Rio Grande Railroad Company, a corporation duly organized, for the purpose of purchasing and acquiring the same, under the laws of the State of Colorado on July 14, 1886, and thereupon said last mentioned company went into the possession and control of the railroad track herein involved and continued to operate it until and including June 9, 1908.

One June 9, 1908, said The Denver and Rio Grande Railroad Company and The Rio Grande Western Railway Company were duly consolidated under and in accordance with the laws of the States of Colorado and Utah to form the plaintiff herein, and among the lines of railway which were designated in and by the certificate or agreement of consolidation as those which the said consolidated company, the plaintiff herein, intended and proposed to acquire, own, hold, maintain and operate, was the line of track herein involved.

This plaintiff thereupon went into the possession and control of the railroad track herein involved, and has operated it continuously since said June 9, 1908.

78

Finding of Fact Number Nine.

That on, to-wit, the 8th day of June, A. D. 1872, there was duly enacted by the Congress of the United States of America, an Act (17 Stats. 339), entitled "An Act Granting the Right of Way Through

the Public Lands to The Denver and Rio Grande Railway Company" wherein and whereby it was provided that:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes and for yard room, and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles; and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns, and all the rights, powers, and franchises conferred by the said laws on corporations created under them for constructing and operating railroad and telegraph lines are hereby ratified and confirmed to the above named railway company, its successors and assigns, and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines are hereby granted to the said company, its successors and assigns, for the extension and operation of its railway and telegraph lines in and through any contiguous territory of the United States, to the northern boundary line of Mexico, subject to the compliance with the conditions and requirements of the

79 general incorporation laws of such territory, so far as the same are applicable and not inconsistent with the laws of the United States; and the same rights, powers, and privileges conferred upon the Union Pacific Railway Company, by section three of an act approved July second, eighteen hundred and sixty-four, are hereby conferred upon the above named company, its successors and assigns. Provided, that application for the assessments of damages shall be made to the court or any judge of a court having jurisdiction in the county in which the lands or premises lie. Provided, that said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe, within five years of the passing of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof, the rights and privileges herein granted shall be rendered null and void, as far as respects the unfinished portion of said road. And provided further, that the said Denver and Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges, and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed, and legalized as existing from the said date of incorporation; but beyond such recognition, ratification, and confirmation of and to said company, this act shall not be construed as affirming or denying the rights of territories to pass laws for the incorporation of railway companies.

"Approved June 8, 1872."

That on, to-wit, the 3rd day of March, A. D. 1875, there was enacted by the Congress of the United States of America, an Act (— Stats. —), entitled, "An Act to correct a clerical error in the Act granting the right of way through the public lands to The Denver and Rio Grande Railway Company, approved June eighth, 80 eighteen hundred and seventy-two", wherein and whereby it was provided that:

"Whereas, in the third session of the Forty-second Congress, the committee of conference on the disagreeing votes of the two houses on the amendments to the bill (S. 984) granting the right of way through the public lands to the Denver and Rio Grande Railway Company, submitted as part of their report the recommendation that the second proviso in the amendment of the House of Representatives adding provisos to the end of the bill be stricken and the following words be inserted:

"And provided further, That the said Denver and Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges, and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed, and legalized as existing from the said date of incorporation; but beyond such recognition, and ratification, and confirmation of and to said company, this act shall not be construed as affirming or denying the rights of Territories to pass laws for the incorporation of railway companies," which report of said committee of conference was concurred in by both houses; and,

"Whereas, in transcribing the bill, the said second proviso in the amendment of the House of Representatives was not stricken out, and the above quoted words were not inserted and do not appear in the law upon the statute books; therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That, the said words above quoted shall be considered and taken as they were intended to be, and they are hereby made a part of said act as approved June eighth, eighteen hundred and seventy-two.

81 "Approved March 3, 1875."

That on, to-wit, the 3rd day of March, A. D. 1877, there was enacted by the Congress of the United States of America, an Act (19 Stats. 405) entitled "An Act to Amend An Act entitled 'An Act Granting the Right of Way through the Public Lands to The Denver and Rio Grande Railway Company, approved June 8, 1872,'" wherein and whereby it was provided that:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled 'An Act Granting the Right of Way through the Public Lands to The Denver and Rio Grande Railway Company,' approved June eighth, eighteen hundred and seventy-two, be and the same is hereby amended by making the second proviso in said act read as follows:

"Provided, that said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and

shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

"Approved March 3, 1877."

Finding of Fact Number Ten.

That on January 22, 1875, the City Council of the City of Denver passed and approved (Chapter XXIX Revised Ordinances of 1875) an Ordinance entitled: "An Ordinance confirming the Rights of Way and other Privileges, heretofore granted to Railroad and other Corporations, in the City of Denver," wherein and whereby it was provided "That all the rights and privileges granted to the respective corporations and persons mentioned in the following ordinances, heretofore passed by the City Council of the City of Denver, and all the obligations, liabilities and requirements therein provided for, are hereby continued and confirmed, that is to say": — among others — "also, an Ordinance entitled, 'An Ordinance Granting the Right of Way to The Denver and Rio Grande Railway Company, through and across certain streets in the City of Denver.'"

That on January 10, 1878, the City Council of the City of Denver passed and approved an Ordinance known as No. 1 of 1878, providing "that in addition to the privileges heretofore given to The Denver and Rio Grande Railway Company, with respect to the use of certain streets in said City, the said Company is hereby granted" certain other street privileges.

In lieu of the words "That as Chapter XXVIII of the revised ordinances of 1878 the City Council of the City of Denver enacted the aforesaid ordinance on January 22, 1875, Chapter XXIX revised ordinances of 1875," which are hereby stricken out, there is hereby substituted the following: "That in 1878 the City Council of the City of Denver codified and revised the ordinances of said city and included in such revision and codification, as Chapter XXVIII thereof, the aforesaid ordinance of January 22, 1875, Chapter XXIX revised ordinances of 1875."

That on January 19, 1886, the City Council of the City of Denver passed and approved an Ordinance known as No. 7 of the Series of 1886, granting certain rights of way in the City streets to The Denver and Rio Grande Railway Company, and Section 2 thereof provided that:

"Sec. 2. The rights, privileges or franchises declared in or by this Ordinance are also expressly declared to be supplementary to an Ordinance enacted by the city council of the City of Denver, and approved heretofore, to-wit: on the first day of June, A. D. 1871, reference to which is heretofore made in the next preceding section; and the rights and privileges hereby granted, and the exercise of the same, are made expressly subject to all and singular the agreements and conditions in said ordinance contained, bearing date of approval as aforesaid, to-wit: June

15, A. D. 1871, so far as the same are or may be applicable thereto."

That on November 30, 1912, the council of the City and County of Denver passed and approved an Ordinance as follows:

"By Authority.

"Ordinance No. 185, Series 1912.

"Aldermanic Bill No. 180, Introduced by Alderman Ford.

"A Bill for an ordinance authorizing and requiring railroad or railway companies maintaining tracks on Wynkoop street, in the city and county of Denver, between the Channel of Cherry creek and Nineteenth street, to pave, at their own expense, under the control and supervision of and according to plans and specifications furnished by, and when ordered by, the Board of Public Works of said city and county of Denver, that portion of said Wynkoop street, lying between the rails of each track so maintained by them, and two feet on the outside of each rail thereof, and to keep such pavement in repair thereafter.

"Whereas, It is necessary to the convenience welfare and security of the City and County of Denver, and the inhabitants thereof, that that portion of Wynkoop Street, in said City and County of Denver extending and running from the channel of Cherry Creek northeasterly to Nineteenth Street be paved with suitable paving; and,

"Whereas, An improvement district for the paving of said portion of Wynkoop Street is about to be created, in accordance with the provisions therefor in the Charter of said City and County of Denver; and,

84 "Whereas, Certain railroad or railway companies maintain tracks along and upon portions of said Wynkoop Street, between the channel of said Cherry Creek and said Wynkoop Street for the purpose of running trains, cars and locomotives thereon: Now therefore,

"Be it enacted by the council of the City and County of Denver:

"Section 1. That when such improvement district is created, all such railroad or railway companies be, and they are hereby, authorized and required, at their own expense, under the control and supervision of, and according to plans and specifications furnished by, and when ordered by the Board of Public Works of said City and County of Denver, to pave that portion of said Wynkoop Street, between the channel of said Cherry Creek and said Nineteenth Street, lying between the rails of each track maintained by them, and two feet on the outside of each rail thereof, and thereafter cause such pavement to be kept and maintained in good order, condition and repair.

"Section 2. Nothing in this Act contained shall apply to any railway company, required specifically by its franchise obligation, license or revocable permit, to pave any portion of said Wynkoop Street, between the channel of said Cherry Creek and said Nine-

teenth Street, but any such railway company shall do such paving as it is required to do under the terms of such franchise obligation, license or revocable permit.

"JNO. W. FORD,

"President of the Board of Aldermen.

"JNO. B. McGAURAN,

"President of the Board of Supervisors.

"Signed and approved by me this 30th day November, 1912.

"HENRY J. ARNOLD, *Mayor.*

"Attested by the undersigned with the corporate seal of the City and County of Denver.

[SEAL.]

"OTTO F. THUM,

"Clerk of the City and County of Denver,

"By C. J. MOORHOUSE, Deputy."

That the track constructed on said Wynkoop Street across said 17th Street in the defendant City by said The Denver and Rio Grande Railway Company prior to August 1, 1871, as aforesaid, and which is the only track this plaintiff has within the limits of the intersection of said Wynkoop and 17th Streets, was the original main line of said The Denver and Rio Grande Railway Company and gave to and was laid for the purpose of securing access to and was used in reaching the old depot of the Kansas, Pacific Railway Company located at 19th Street in said former City of Denver and in the defendant City; and up to the time of the construction of the present Union Depot in the defendant City about 1880 or 1881, said track was used as the main passenger track of said The Denver and Rio Grande Railway Company, the passenger business of which said Company was conducted at said old depot of said Kansas, Pacific Railway Company; said Kansas, Pacific Railway Company's old depot came to be known as the Union Pacific old depot, and was located at said 19th and Wynkoop Streets, as aforesaid. Subsequently, and many years prior hereto, numerous industries were built up on said Wynkoop Street between said 17th Street and said 19th Street, and said The Denver and Rio Grande Railway Company, and this plaintiff, and its predecessors in interest at various times in 1884, 1886, 1889 and 1892, constructed side tracks and industrial spur tracks on said Wynkoop Street under said Ordinance No. 9 of the Series of 1871 (one of which said spur or side tracks cross-said 17th Street). And this plaintiff and its predecessors in interest have ever since the first day of August, A. D. 1871, openly, notoriously, continuously, peaceably, uninterruptedly and under a claim of right known to the defendants herein and each of them and to said the former City of Denver, and daily and from day to day, without complaint, objection, interruption or interference by or from said former City of Denver or the defendants herein, or any one else, and for a period of over forty years,

used, maintained and operated said track on said Wynkoop Street across said 17th Street, in the defendant City, as part of its main line, or as a means and facility for serving said industries on said Wynkoop Street and setting out cars to said industries for loading and unloading and picking up cars loaded and unloaded thereat, and said track during all said time was used by this plaintiff and its predecessors in interest, and is now being used by this plaintiff, and has been used by this plaintiff ever since its formation in 1908, as aforesaid, as an integral part and parcel of its railway system engaged at all said times in interstate commerce and in the transportation of persons and property between Colorado and the several other States and Territories of the United States and the District of Columbia, and foreign countries. Among the industries so built up, as aforesaid, and so served by this plaintiff and its predecessors in interest, as aforesaid, are prominent and important lumber industries, mercantile interests, machinery interests, mining and milling supply company interests, and other interests, all of vast public importance to the commercial and financial interests of the defendant City, and the public at large. This plaintiff and its predecessors in interest have heretofore handled all of the freight originating at or destined to said industries, where such freight came into or departed from the City via the lines of this plaintiff and its predecessors in interest or other lines of railroad.

87

Finding of Fact Number Twelve.

That the plaintiff has now only one track and it and its predecessors in interest have always had only one track within the limits of the intersection of Wynkoop and 17th Streets in the City of Denver. This one track was the original main line of The Denver and Rio Grande Railway Company and gave it access to the old depot as in the complaint herein set forth, and its main passenger business was conducted thereover until the time of the construction of the present Union Depot in 1881. Since that time that track has been used by The Denver and Rio Grande Railway Company and said The Denver and Rio Grande Railroad Company and this plaintiff continuously in handling carloads of freight and empty freight cars to and from the industries situated on Wynkoop Street between 17th and 19th Streets, in the City of Denver. Among those industries are: The Hendrie and Bolthoff Manufacturing and Supply Company, large dealers in mining and electrical machinery and supplies and hardware; The McPhee and McGinnity Company, large dealers in mill supplies, lumber, sash, doors, blinds, nails, paints and window glass; The Brown Mercantile Company wholesale grocers and commission merchants; J. D. Best and Company, large dealers in hay, grain, flour, feed and storage; and H. M. Stone's large general merchandising and brokerage business. During those years plaintiff and its predecessors in interest handled and now handles over that track all the freight originating at or destined to those industries where such freight comes into or departs from the City via the Rio Grande or other lines, including the Union Pacific Railroad Company, the Colorado

and Southern Railway Company, the Chicago, Burlington and Quincy Railroad Company, the Atchison, Topeka and Santa Fe Railway Company, and the Chicago, Rock Island and Pacific 88 Railway Company. Over a period of several years last past an average of about 847 carloads of freight per year were handled to and from those industries over that track. Of that number about 101 cars, or about $12\frac{1}{2}\%$, are outbound, and the remainder inbound freight. That freight comes from and goes to points and places both within and without the State of Colorado and other States. Of the outbound freight about 94 cars, or 93%, is shipped to points on plaintiff's lines with which system this track connects and of which it is part. The outbound freight is both intrastate and interstate in character as is also the inbound freight above mentioned. Of the inbound freight about 246 cars, or one-third, or $33\frac{1}{3}\%$ arrives in Denver over the lines of plaintiff, and the remainder thereof over foreign lines. Plaintiff received and receives for switching cars to and from these industries from and to foreign lines twenty cents per ton with a minimum of three dollars per ton. The annual revenues derived by this plaintiff from foreign lines for that switching service has been between \$1,500 and \$2,000 a year average. That amount plaintiff would lose were this track to be removed across the intersection of 17th Street. The Union Pacific Railroad Company has a track on Wynkoop Street between 17th and 19th Streets, in Denver, which it has not used for about twenty years. Should the plaintiff's track at the intersection of Wynkoop and 17th Streets in Denver be removed, it would be necessary that the carloads of freight handled by the plaintiff into and out of those industries should be interchanged and transferred between the plaintiff and the Union Pacific Railroad Company through and by means of the tracks at the Union depot, which tracks are owned and controlled by an independent corporation, to-wit, the Denver Union Terminal Railway Company, and in that event plaintiff would be compelled to pay to the said Union Pacific Railroad Company, a switching charge 89 in such sum as might be required by said Union Pacific Railroad Company for setting out and picking up cars of freight to and from said industries routed over the lines of the plaintiff, and the loss of revenue resulting therefrom would be such switching charge as it would have to pay therefor, and estimated on the present basis of switching charges paid to the plaintiff, to-wit, twenty cents a ton, or three dollars a car, minimum on 347 cars a year, inbound and outbound freight handled by plaintiff, the loss to plaintiff would aggregate between \$1,000 and \$1,500. Furthermore, if the tariffs of the plaintiff were changed by permission of the Interstate Commerce Commission or the Public Utilities Commission of the State, so as to compel the industries so served to absorb said switching charges, then, in all probability the result would be that said freight, and especially the inbound freight, would eventually be entirely routed over the lines of the Union Pacific Railroad Company in order to avoid the absorption of said switching charge, and, consequently, would result in the consequent loss of business to the plaintiff. This track joins

with other freight tracks of the plaintiff Company, and thence with the main lines of the plaintiff Company.

Finding of Fact Number Thirteen.

That on March 30, A. D. 1914, while the facts, conditions and circumstances hereinbefore set forth existed, the Council of said defendant City, passed, adopted and enacted an Ordinance known as "Ordinance No. 34, Series 1914, Commissioner Bill No. 31, Introduced by Commissioner Hunter," the same being entitled: "A Bill for an Ordinance repealing Ordinance No. 60 of the Series of 1886, and Ordinance No. 9 of the Series of 1871, and Ordinance No. 7 of the Series of 1886, and Ordinance No. 63 of the Series of 1892, and

90 all other Ordinances or parts of Ordinances in conflict herewith, and providing for the elimination of all railway tracks at the Seventeenth Street crossing where the same intersects Wynkoop Street in the City and County of Denver, and providing for the removal of all said tracks at said 17th Street crossing by The Denver and Rio Grande Railway Company and the Union Pacific Railway Company, or by the Commissioner of Improvements." A true copy of said Ordinance No. 34 of the Series of 1914, as follows:

By Authority.

Ordinance No. 34. Series 1914.

Commissioner Bill No. 31. Introduced by Commissioner Hunter.

A Bill for an Ordinance repealing Ordinance No. 60 of the series of 1886, and Ordinance No. 9 of the series of 1871, and Ordinance No. 7 of the series of 1886, and Ordinance No. 63 of the series of 1892, and all other ordinances or parts of ordinances in conflict herewith, and providing for the elimination of all railway tracks at the Seventeenth-street crossing where the same intersects Wynkoop street in the city and county of Denver, and providing for the removal of all said tracks at said Seventeenth-street crossing by the Denver and Rio Grande Railway Company and the Union Pacific Railway Company, or by the Commissioner of Improvements.

Be it enacted by the Council of the city and county of Denver:

Whereas, Heretofore the City of Denver, now the City and County of Denver, did, by various ordinances, grant to the Union Pacific Railway Company, and the Denver and Rio Grande Railway Company, a right to extend their respective railway tracks along Wynkoop Street and across Seventeenth Street in City of Denver, now City and County of Denver, State of Colorado, and

Whereas, The said The Union Pacific Railway Company and The Denver and Rio Grande Railway Company have, by virtue of said grants, exercised said right or privilege, and now are so exercising said right and privilege; and

Whereas, In the opinion of the Council the further maintenance of the said tracks by said Union Pacific Railway Company and said Denver and Rio Grande Railway Company across said Seventeenth Street, where the same intersects Wynkoop Street, has become an impediment to public travel, and greatly retards the general public in its right of use of said Seventeenth Street; and

Whereas, From inspection, the use of the said crossing for the purpose for which the same was originally granted, and for which it has been used, is now wholly unnecessary to the said railway companies or either of them, and that the continuation of the use of the same for the purpose originally contemplated involves the safety of life and limb of the traveling public whose business necessitates their egress from the city or their ingress into the city; and

Whereas, The privilege of the said corporations to a right of way across said street, with its tracks and structures, was subject to the existing public right of use, and was so to be exercised as not to interfere with those for whose benefit the said Wynkoop and Seventeenth Streets in said City of Denver were originally laid out and opened;

Now therefore, be it enacted by the Council of the city and county of Denver:

Section 1. That Ordinance No. 60 of the series of 1886, and Ordinance No. 9 of the series of 1871, and Ordinance No. 7 of the series of 1886, and Ordinance No. 63 of the series of 1892, and all other ordinances or parts of ordinances be, and the same are hereby repealed, in so far as the same confers any privilege, license, rights or rights claimed by or on behalf of the Union Pacific Railway Company and the Denver and Rio Grande Railway Company to maintain and continue their track or tracks across Seventeenth Street at the point where said Seventeenth Street intersects Wynkoop Street.

Section 2. That it shall be unlawful from and after the passage of this ordinance, and the taking effect thereof, for the said Denver and Rio Grande Railway Company or the said Union Pacific Railway Company, its agents, officers or representatives, to maintain and continue said tracks at the said Seventeenth Street crossing, and that they shall, within thirty days after notice, as herein provided for, remove all tracks heretofore laid by them and now existing on said Seventeenth Street at the crossing aforesaid.

Section 3. That the Commissioner of Improvements shall, upon the taking effect of this ordinance, notify the said Union Pacific Railway Company and the said Denver and Rio Grande Railway Company to remove all said track or tracks on said street at said crossing, within the time as herein provided, and that, if the said Union Pacific Railway Company and the said Denver and Rio Grande Railway Company shall refuse or neglect to remove said tracks so now maintained by them at and upon said Seventeenth Street at said crossing, then and in that case the Commissioner of Improvements is hereby empowered, authorized and directed to take such means and methods or measures as he may deem proper and necessary to remove all of said track or tracks at said point on Seventeenth Street where the same cross Wynkoop Street.

Signed and approved by me this 30th day of March, A. D. 1914.

J. M. PERKINS, *Mayor*.

Attested by the undersigned with the corporate seal of the City and County of Denver.

[SEAL.]

OTTO F. THUM,
Commissioner of Property, ex-Officio Clerk
of the City and County of Denver,
By C. J. MOORHOUSE,
Deputy Clerk.

Published in The Denver Times this 1st day of April, A. D. 1914.

91 Said Ordinance No. 34 of the Series of 1914, was published in the "Denver Times," a newspaper of general circulation in the said City and County of Denver on April 1, A. D. 1914; that said Ordinance No. 34 of the Series of 1914, was introduced into the Council on the 9th day of March, A. D. 1914, by the defendant John B. Hunter as Commissioner of Improvements of said defendant City as Commissioner Bill No. 31; and a copy of said ordinance so introduced with a notice of the introduction thereof was published in said "Denver Times" on the 12th day of March, A. D. 1914, and prior to the passage, enactment and adoption of said Ordinance No. 34 of the Series of 1914, the plaintiff caused to be served upon each of the defendants herein a protest against the passage of said Ordinance and Commissioner Bill No. 31, a copy of which said protest is as follows:

"Protest.

"To the Honorable Council of the City and County of Denver:

"Comes now The Denver and Rio Grande Railroad Company, a consolidated corporation organized and existing under and by virtue of the laws of the State of Colorado and of the State of Utah, and solemnly and respectfully protests against the adoption by said Council of Commissioner Bill No. 31 for an Ordinance repealing Ordinance No. 60 of the Series of 1886, and Ordinance No. 9 of the Series of 1871, and Ordinance No. 7 of the Series of 1886, and Ordinance No. 63 of the Series of 1892, and all other ordinances or parts of Ordinances in conflict therewith, and providing for the elimination of all railway tracks at the 17th Street crossing where the same intersects Wynkoop Street in the City and County of Denver, and providing for the removal of all said tracks at said 17th Street crossing by The Denver and Rio Grande Railway Company and the Union Pacific Railway Company, or by the Commissioner of Improvements.

92 "Your protestant, while recognizing the authority of the Council of said City and County to regulate within reason, the use by your protestant of its track on Wynkoop Street at the intersection thereof with 17th Street, in said City and County, respectfully denies the authority of the Council of said City and County to remove or require the removal of the track of your protestant at said intersection.

"Your protestant further declares, as it has heretofore declared,

its willingness to submit to reasonable regulation of its use of said track at the intersection of said streets, and its willingness to limit its use thereof to such hours between one o'clock and six o'clock A. M. as shall cause no interference with or inconvenience to the users of said street at said intersection, and prays that the legal and equitable rights of your protestant may be shown that respect and given that protection to which the rights of citizens and residents of said City and County are lawfully entitled.

"THE DENVER AND RIO GRANDE RAILROAD COMPANY,

"By E. L. BROWN, *Vice-President*.

"The foregoing protest was served on Council of the City and County of Denver, at the hour of 1:55 o'clock P. M., on the 30th day of March, 1914, by delivering a full, true and correct copy thereof to each of the following named persons, members of said Council, and to C. J. Moorhouse, Secretary and Clerk thereof, at the office of said Council in the City Hall in the City and County of Denver and State of Colorado.

93 "Hon. J. M. Perkins, Commissioner of Social Welfare and Mayor.

"Hon. Otto F. Thum, Commissioner of Property.

"Hon. Clair J. Pitcher, Commissioner of Finance.

"Hon. Alexander Nisbet, Commissioner of Safety.

"Hon. John B. Hunter, Commissioner of Improvements.

"Served on the above named 1:55 P. M. March 30, 1914.

"H. A. HAVENER."

That said Ordinance No. 34 of the Series of 1914, became effective under the provisions of the charter of the defendant City on the first day of May A. D. 1914.

That on the second day of May, A. D. 1914, the defendant John B. Hunter as Commissioner of Improvements, of the said defendant City, acting under and in pursuance to the provisions of section 3 of said Ordinance No. 34 of the Series of 1914, served or caused to be served upon this plaintiff a notice, a true copy of which is as follows:

"Law Department.

"I. N. Stevens,

"Attorney for the City and County of Denver.

"To The Denver and Rio Grande Railroad Company, Its Officers, Agents and Representatives:

"You are hereby notified to remove the railway or railroad tracks at the foot of 17th Street, where the same crosses Wynkoop Street, in the City and County of Denver, within thirty (30) days from the date of the service of this Notice, in pursuance with the provisions of Ordinance No. 34 of the Series of 1914, copy of which is hereby attached for the purpose of advising you at this

DEPART

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

608	Colorado Springs, Pueblo, Canon City, Oklahoma, Chicago, Kansas City, St. Louis, New Mexico, California, Arizona, Texas, Leadville, Grand Junction, Salt Lake and Pacific Coast points, daily	3:50 am
4	Colorado Springs, Pueblo, Canon City and Cripple Creek, daily	8:00 am
12	Missouri River Flyer, for Colorado Springs, Pueblo, Canon City, La Junta, Kansas City, St. Louis, Chicago, Oklahoma, Texas, Leadville, Glenwood Springs, Grand Junction, Salt Lake and Pacific Coast points, daily	9:30 am
2	Colorado Springs, Pueblo and Canon City, daily	12:15 pm
610	Colorado Springs, Pueblo, Kansas City, Chicago, St. Louis, California, Arizona, Texas, Leadville, Grand Junction, Salt Lake and Pacific Coast points, daily	3:30 pm
16	Colorado Springs, Leadville, Aspen, Glenwood and California, daily	3:30 pm
263	Grand Junction, Utah and Pacific Coast points, daily	6:45 pm
6	Kansas City, Chicago, St. Louis, Texas, Oklahoma, Mexico, California, Arizona points, daily	7:45 pm
8	Colorado Springs and Pueblo, daily	11:30 pm

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

304	Great Northern-Seattle Special for Fort Morgan, Sterling and Big Horn Basin, Billings, Great Falls, Spokane, Portland, Seattle, daily	2:45 am
10	Atlantic Coast Limited for Fort Morgan, Lincoln, Iowa and Illinois points, Chicago and East, daily	9:05 am
14	St. Louis Limited, for Fort Morgan, St. Joseph, Kansas City, St. Louis and all Southern and Eastern points, daily	2:00 pm
6	Chicago Limited, for Fort Morgan, Lincoln, Nebraska, Iowa, and Illinois points, daily	3:30 pm
302	Northern Pacific-Seattle Special for Fort Morgan, Sterling, Deadwood, Billings, Butte, Spokane, Seattle and Portland, daily	7:20 pm
16	St. Louis Express, for Fort Morgan, St. Joseph, Kansas City, St. Louis, East and South, daily	9:00 pm
2	Overland Express, for Fort Morgan, Lincoln, Omaha City, Omaha, St. Paul, Minneapolis, Chicago and East, daily	9:45 pm
264	Sunday Special, for Lafayette, Erie, Longmont and Lyons (Eates Park), Sunday only	8:30 am
181	Mountain Special, for Lafayette, Erie, Longmont and Lyons (Eates Park), daily except Sunday	9:00 am
183	Mountain Special, for Lafayette, Erie, Longmont and Lyons (Eates Park), daily except Sunday	3:00 pm

7	Pueblo and Colorado Springs, daily	7:00 am
13	Colorado Springs, Glenwood, Aspen, Leadville, Utah, Nevada, Montana, Idaho, Oregon, Washington and California, daily	8:50 am
5	Pueblo, Colorado Springs, Chicago, Kansas City, St. Louis, Texas, Pacific Coast, Mexico, Arizona, New Mexico, daily	10:00 am
607	Chicago, Kansas City, Pueblo, Colorado Springs and California Limited, from California and Arizona, daily	2:15 pm
1	Canon City, Pueblo and Colorado Springs Express, daily	3:20 pm
11	Colorado Flyer from Chicago, St. Louis, Oklahoma, Texas, Canon City, Pueblo and Colorado Springs, daily	5:30 pm
601	Arctic Express, from Chicago, Pueblo and Colorado Springs, local daily	6:45 pm
274	Pueblo, Colorado Springs and Cripple Creek Express, daily	8:20 pm
3	Overland Express from Chicago, Omaha, Lincoln and Fort Morgan, daily	7:20 am
15	St. Louis Express from St. Louis, Kansas City, St. Joseph and Fort Morgan, daily	7:50 am
301	Northern Pacific-Seattle Special from Portland, Seattle, Spokane, Butte, Billings, Deadwood, Sterling and Fort Morgan, daily	8:25 am
9	Atlantic Coast Limited from New York, Chicago, Omaha, Lincoln and Fort Morgan, daily	1:15 pm
13	Colorado Limited from St. Louis, Kansas City, St. Joseph and Fort Morgan, daily	3:30 pm
275	Overland Limited from Chicago, Lincoln and Fort Morgan, daily	8:30 pm
303	Great Northern-Seattle Special from Fort Seattle, Spokane, Great Falls, Billings, Sterling and Fort Morgan, daily	10:20 pm
182	Mountain Special, from Lyons (Eates Park), Sunday	8:30 am
184	Mountain Special, from Lyons (Eates Park), Sunday	1:30 pm
188	Sunday Special, from Lyons (Eates Park), Longmont, Erie and Lafayette, Sunday only	7:30 pm

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5	"Eastern Express," from Lincoln, Omaha, Des Moines, Chicago and the East, St. Louis, Kansas City, St. Joseph, Topeka and the Southeast	7:35 am
★ 39	"Colorado River," from St. Louis, Kansas City	

★ 39

St. Joseph, Atchison, Topeka and the South- east	11.45 am
"Rocky Mountain Limited," from Chicago, Des Moines Omaha, Lincoln and the East	1.55 pm

16 pm

7	TEXAS EAST MAIL from New Orleans, Galveston, San Antonio, Houston, Dallas, Ft. Worth, El Paso, Memphis, Oklahoma points, Trinidad, Wabensburg, Pueblo and Colorado Springs, daily.	7.00 am
13	WESTERN EXPRESS from Grand Junction, Greenwood Springs, Aspen, Leadville, Buena Vista and Colorado Springs, daily.	8.30 am
15	Pueblo and Colorado Springs Passenger, daily.	10.00 am
17	Accommodation, from Eastonville, Elbert and Elizabeth, daily.	11.15 am
607	Pueblo and Colorado Springs Passenger, daily.	2.15 pm
1	TEXAS EAST MAIL from New Orleans, Galveston, San Antonio, Houston, Dallas, Fort Worth, El Paso, Memphis, Oklahoma, Trinidad, Wabensburg, Pueblo and Colorado Springs, daily.	3.20 pm
977	Passenger, from Falcon, Eastonville, Elbert and Elizabeth, daily.	4.50 pm
11	Pueblo and Colorado Springs Passenger, daily.	5.30 pm
3	Pueblo and Colorado Springs Passenger, daily.	5.45 pm
601	Express, from Pueblo, Cripple Creek, Colorado Springs, California, Oregon, Washoe, Carson, Idaho, Nevada, Utah, Grand Junction, Glenwood Springs, Aspen and Leadville, daily.	9.30 am

228

with

52 Silver Plume, Georgetown, Idaho Springs, Central City, Black Hawk and Golden Mail and Express, daily 9.45 am

54 Silver Plume, Georgetown, Idaho Springs, Central City, Black Hawk and Golden Mail and Express, daily 5.30 pm

56 Excursion train from the summit of Mt. McClellan, Silver Plume, Georgetown, Idaho

and

DISTRICT.
 34 Fort Collins Special, from Fort Collins, Loveland, Berthoud, Longmont, Boulder, Lafayette and Louisville, daily..... 9:30 am
 22 Cheyenne, Wellington, Greeley, Fort Collins, Loveland, Longmont and Boulder North and Express, daily.....12:05 pm
 24 Greeley, Fort Collins, Longmont, Loveland, Boulder, Express, daily..... 5:40 pm
 36 Eldora, District, Boulder and Louisville, Mail and Express, daily..... 6:00 pm

71

and

LEADVILLE DISTRICTS.
 73 Platte Canon Resorts, from Grant, Shawnee,
 Railways and Pine Grove, daily except Sunday. 3.30 am
 71 Mail and Express, from Leadville, Berckea-
 ridge, Como, Grant (Accommodation from
 Alma and Fairplay to Como, Mondays, Wednes-
 days and Fridays only); Platte Canon Resorts,
 Sundays from Grant only; other days from
 Leadville 7.00 pm
 75 Sunday only, Platte Canon Fishermen's Train.

61

15 pm

	RAINS	
61	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily except Sunday.....	8.20 am
63	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily.....	10.30 am
65	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily.....	12.50 pm
67	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily.....	4.45 pm
69	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily.....	7.45 pm

16
280

END

16 Colorado-New Mexico Express, from Rico, Telluride, Ouray, Grand Junction, via Narrow Gauge, Montrose, Gunnison, Silverton, Durango, Creede, Alamosa, La Veta, Walsenburg, Leadville, Salida, Canon City, Florence, Pueblo, and Colorado Springs, daily (Pagosa Springs)

12

6 San Francisco-Chicago Express from Los Angeles, San Francisco, California, Nevada, Utah, Grand Junction, Glenwood, Aspen, Lake and Castle Rock, daily.....12.05 pm

14

281 from St. Louis, Kansas City, Pueblo, Manitou, Colorado Springs and Palmer Lake, daily 4.15 pm
Atlantic Coast Mail, from California, Oregon,

281

280 Colorado-San Francisco Express for Castle Rock, Palmer Lake, Colorado Springs, Pueblo, Florence, Canon City, (Westcliffe, daily except Sunday), Salida, Leadville, Glenwood, Grand Junction, Utah, Nevada, and California, daily 8:00 am

11 Eastern Limited, for Colorado Springs, Pueblo, Wichita, Kansas City and St. Louis, daily 12:05 pm

9 Eastern Express, for Castle Rock, Palmer Lake, Colorado Springs, Cripple Creek and Victor (via Colorado Springs), Pueblo, Canon City, Kansas City and St. Louis, daily 3:40 pm

2 Pacific Coast Mail for Colorado Springs, Pueblo, Florence, Canon City, Salida, Leadville, Glenwood, Aspen, Grand Junction, Utah, Montana, Oregon, Washington, California, daily 5:45 pm

13 Pueblo and San Juan Express, for Walsenburg, Alamosa, Creede, Durango, Silverton, daily except Saturday 7:35 pm

15 Colorado Express, for Colorado Springs, Pueblo, Florence, Canon City, Salida, Leadville, Glenwood, Aspen, Grand Junction, via Narrow Gauge, Ouray, Telluride and Rico, daily (and to Lake City, daily except Saturday) 9:00 pm

21 Overland Park, Petersburg, Littleton and Fort Logan, daily except Sunday 6:55 am

23 Overland Park, Petersburg, Littleton and Fort Logan, daily 9:05 am

25 Overland Park, Petersburg, Fort Logan and Littleton, daily 12:30 pm

27 Littleton and Fort Logan, daily 3:20 pm

29 Overland Park, Petersburg, Fort Logan and Littleton, daily, (except Saturday and Sunday 6:00 p m) 5:20 pm

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27 Littleton and Fort Logan, daily 3:20 pm

29 Overland Park, Petersburg, Fort Logan and Littleton, daily, (except Saturday and Sunday 6:00 p m) 5:20 pm

271 Overland Park, Petersburg, Littleton and Fort Logan, daily except Sunday 6:55 am

23 Overland Park, Petersburg, Littleton and Fort Logan, daily 9:05 am

25 Overland Park, Petersburg, Fort Logan and Littleton, daily 12:30 pm

27 Littleton and Fort Logan, daily 3:20 pm

29 Overland Park, Petersburg, Fort Logan and Littleton, daily, (except Saturday and Sunday 6:00 p m) 5:20 pm

271 Overland Park, Petersburg, Littleton and Fort Logan, daily except Sunday 6:55 am

23 Overland Park, Petersburg, Littleton and Fort Logan, daily 9:05 am

25 Overland Park, Petersburg, Fort Logan and Littleton, daily 12:30 pm

27 Littleton and Fort Logan, daily 3:20 pm

29 Overland Park, Petersburg, Fort Logan and Littleton, daily, (except Saturday and Sunday 6:00 p m) 5:20 pm

271 Overland Park, Petersburg, Littleton and Fort Logan, daily except Sunday 6:55 am

23 Overland Park, Petersburg, Littleton and Fort Logan, daily 9:05 am

25 Overland Park, Petersburg, Fort Logan and Littleton, daily 12:30 pm

27 Littleton and Fort Logan, daily 3:20 pm

29 Overland Park, Petersburg, Fort Logan and Littleton, daily, (except Saturday and Sunday 6:00 p m) 5:20 pm

UNION PACIFIC RAILROAD CO.

EASTERN DISTRICT

120 "Kansas City Limited," for Limon, Hugo, Oakley, Ellis, Salina, Topeka, Lawrence, Leavenworth, Kansas City, East and South, daily 10:00 am

*102 "Daily Limited," for Limon, Oakley, Salina, Topeka, Lawrence, Leavenworth, Kansas City, St. Louis, East and South, daily 1:40 pm

*104 "Atlantic Express," for Limon, Hugo, Oakley, Ellis, Salina, Kansas City, Topeka, Lawrence, Leavenworth, Parsons, Chicago, St. Louis, Dallas, East and South, daily 8:40 pm

272 "California Mail," for Brighton, Erie, Boulder, La Salle, Evans, Greeley, Eaton, Ault, Cheyenne, Ogden, Salt Lake, San Francisco, Los Angeles, daily 7:30 am

119 "Pacific Limited," for Greeley, Cheyenne, Ogden, Salt Lake, San Francisco, Los Angeles, Pocatello, Butte, Boise, Spokane, Portland, Seattle, daily 12:25 pm

101 "Overland Limited," Greeley, Cheyenne, Ogden, Salt Lake, San Francisco, daily 4:40 pm

109 "Los Angeles, Oregon-Washington Limited," for Brighton, La Salle, Greeley, Cheyenne, Ogden, Salt Lake, San Francisco, Los Angeles, Pocatello, Butte, Boise, Spokane, Portland, Seattle, daily 7:05 pm

161 Local, for Eastlake, St. Vrain, Dacono, Dent, Dacono, Dent, Milliken, Fort Collins, daily 8:00 am

273 Local for Eastlake, St. Vrain, Dacono, Dent, Milliken, Fort Collins, daily 8:00 am

163 Local for Eastlake, St. Vrain, Dacono, Dent, Milliken, Fort Collins, daily 8:00 am

14 "Denver Special," for Fort Morgan, Merino, Alwood, Sterling, Iliff, Crook, Sedgewick, Ovid and Julesburg-Nebraska, Iowa, Illinois, Chicago and points beyond-daily 10:30 am

12 "Colorado Special," for Kersey, Fort Morgan, Merino, Alwood, Sterling, Iliff, Crook, Sedgewick, Omaha, Chicago, Nebraska, Iowa, Illinois and all points East-daily 3:30 pm

16 "Chicago Express," for Kersey, Fort Morgan, Union, Merino, Sterling, Iliff, Crook, Red Lion, Sedgewick, Omaha, Chicago, St. Paul and East, daily 10:00 pm

"Trains of the above railroads usually maintain their schedule time, but neither the said roads nor the Denver Union Terminal Railway Company guarantees that they maintain this schedule."

JULESBURG DISTRICT

15 "Colorado Express," from Omaha, Chicago, St. Paul and East, Sedgewick, Crook, Iliff, Merino, Fort Morgan, Kersey, La Salle, daily 7:30 am

13 "Colorado Special," from Nebraska and points beyond-Illinois, Iowa, Nebraska, Julesburg, Sedgewick, Red Lion, Crook, Proctor, Iliff, Sterling, Alwood, Merino, Fort Morgan, Kersey, Brighton, daily 1:30 pm

11 "Overland Special," from Chicago and East, Omaha, Merino, Fort Morgan, daily 9:55 pm

"Trains of the above railroads usually maintain their schedule time, but neither the said roads nor the Denver Union Terminal Railway Company guarantees that they maintain this schedule."

FORT COLLINS DISTRICT

160 Local, from Fort Collins, Milliken, Dent, La Salle, Dacono, St. Vrain, Eastlake, Boulder, Erie, daily 9:45 am

162 Local, from Fort Collins, Milliken, Dent, Brigadaire, Gill, Greeley, La Salle, Dacono, Eastlake, Boulder, Erie, daily 9:30 pm

164 Local, from Cheyenne, Pierce, Ault, Eaton, Greeley, La Salle, Plattville, Lupton, Brighton, Erie, daily 7:30 pm

284 "California Mail," from San Francisco, Los Angeles, Seattle, Portland, Spokane, Boise, Butte, Pocatello, Ogden, Salt Lake, Cheyenne, Greeley, La Salle, Brighton, Boulder, Erie, daily 9:30 am

102 "Overland Limited," from San Francisco, Los Angeles, Seattle, Portland, Spokane, Boise, Butte, Pocatello, Ogden, Salt Lake, Cheyenne, Greeley, daily 11:15 am

104 "California Express," from San Francisco, Los Angeles, Ogden, Salt Lake, Wyoming points, Cheyenne, Greeley, La Salle, Brighton, Boulder, Erie, daily 8:00 pm

106 Local from Cheyenne, Pierce, Ault, Eaton, Greeley, La Salle, Plattville, Lupton, Brighton, Erie, daily 7:30 pm

time as the provisions of the Ordinance requires, said Ordinance having full force and effect on the first day of May, A. D. 1914.

"Dated at Denver, Colorado, this second day of May, A. D. 1914.

"J. B. HUNTER,

*"Commissioner of Improvements,
City and County of Denver.*

"(Attached to the foregoing notice was a printed copy of Ordinance No. 34 of the Series of 1914)."

Finding of Fact Number Fourteen.

Said 17th Street, where the same intersects Wynkoop Street is one of the main thoroughfares of the City of Denver, and leads directly to the Union Passenger Depot in said City, said Depot being owned and controlled by said The Denver Union Terminal Railway Company; said Depot is the terminal of the lines of railroad mentioned on the printed schedule following which shows the passenger trains scheduled to arrive at and depart from said Union Depot daily:

(Here follows schedule showing arrival and departure of trains, marked p. 95.)

96 Said crossing at 17th and Wynkoop Streets is used by persons going to and coming from said Union Depot, and the trains arriving at and departing therefrom, and by vehicles for the transportation of passengers and their baggage going to and from said Depot, and the average number of persons so using said crossing in their passage to and from said Union Depot daily is approximately between fifteen hundred and twenty-five hundred persons, and the switching of railroad cars by the plaintiff over said track at said intersection of said streets produces that inconvenience which unavoidably follows the delay thereby of passengers or vehicles thereat, and such danger as naturally and ordinarily attends crossing and railroad track- situated and used as this track is.

That on Sundays, Festival Days and Convention Days the traffic across said Wynkoop Street on 17th Street reaches in numbers a considerable excess over the twenty-five hundred heretofore stated.

Finding of Fact Number Fifteen.

That the Ordinances of the City of Denver authorized the Mayor and Council of said City to require of steam railroad companies operating within the corporate limits of said City the placing of flagmen, gates, automatic crossing bells, or other safety appliances at such places and street crossings within the said City as *and* may be designated by said Mayor and the Council, and that the same shall be maintained and operated by competent attendants in charge thereof during such time or hours as shall be designated by said Mayor and Council, and accordingly the Ordinances of said City of Denver designate certain places where said flagmen, gates, automatic crossing bells and other safety appliances must and shall be maintained, but no such requirement has been or is made by the Mayor or Council of
 97 said City of Denver with respect to said crossing at the intersection of said Wynkoop and 17th Street.

Finding of Fact Number Sixteen.

That since 1881 this track has not been used as the main line of railroad but as a switching track for reaching said industries and setting out thereto and picking up therefrom inbound and outbound freight, interstate and intrastate in character.

Finding of Fact Number Seventeen.

That the charter of the City of Denver of February 9, 1866, conferred upon the City Council of said City of Denver among other powers the power "to open, alter, abolish, widen, extend, establish, pave, grade or otherwise improve and keep in repair", the streets of the City, and also "to sell and convey the property of the City for the benefit of the inhabitants", and also "to provide for enclosing, improving and regulating all public grounds belonging to the City", and also "to prevent and remove all encroachments into or upon the streets."

That the charter of the City of Denver of February 13, 1874, con-

ferred upon the City Council of the City certain powers among which was the power "To regulate and prohibit the use of locomotive engines, and require railroad cars to be propelled by other power than that of steam, to direct and control the location of railroad tracks, and to require railroad companies to construct, at their own expense, such bridges, tunnels, or other conveniences at public railroad crossings, as the City Council may deem necessary, and to regulate the rates of speed of all railroad trains."

That the charter of the City of Denver of February 19, 1879, and various subsequent charters of the City of Denver all conferred upon the City Council of the City of Denver the power to direct and
 98 control the location of railroad tracks by language similar to that of said charter of 1874.

Finding of Fact Number Eighteen.

That the plaintiff alleged in paragraph VII of its complaint that: "When said Ordinance No. 9 of the Series of 1871, above mentioned, was so accepted and acted upon by said The Denver and Rio Grande Railway Company, and the tracks of said The Denver and Rio Grande Railway Company were located, laid out, constructed, maintained and operated by said The Denver and Rio Grande Railway Company, as aforesaid, said Ordinance No. 9 of the Series of 1871 became and ever since its passage, enactment and adoption has been and now is a created and constituted valid contract and an irrevocable franchise between said the City of Denver and the said defendant City, and said The Denver and Rio Grande Railway Company and its successors in interest, including this plaintiff and a contract and franchise which the said City of Denver and the defendant City was and is not at liberty to impair during its continuance and was and is a contract and franchise whereby said The Denver and Rio Grande Railway Company and its successors in interest, including this plaintiff, is and are secured in the exercise and enjoyment of the right of way and the rights, powers, privileges and franchises conferred by said Ordinance No. 9 of the Series of 1871, and the said Ordinance No. 9 of the Series of 1871, and the right of way and the rights, powers, privileges and franchises therein conferred became, upon the acceptance thereof, as aforesaid, by said The Denver and Rio Grande Railway Company a substantial vested property and property right of said The Denver and Rio Grande Railway Company, and its successors in interest, including this plaintiff."
 99

And on the trial of this cause and the argument of the same to the court, the plaintiff urged the contentions embraced in said allegations.

Finding of Fact Number Nineteen.

That the plaintiff alleged in paragraph XII of the complaint: "And plaintiff further alleges that any interference with said track across said 17th Street of the right of this plaintiff to use, op-

erate and maintain the same, would seriously impair and destroy the ability of this plaintiff to serve its patrons, the aforesaid industries, and would occasion an irreparable injury to this plaintiff and an injury not susceptible of definite admeasurement in damages, and any interference with this plaintiff in the use of said tracks across said 17th Street, or any interference with said track, or the obstruction of the same, or the removal thereof, would impair the contract rights of this plaintiff in the premises in violation of the Constitution of the United States and of the State of Colorado, and would take the property of this plaintiff without due process of law, and without compensation, in violation of the Constitution of the United States and of the State of Colorado, and would deny to this plaintiff the equal protection of the laws in violation of the Constitution of the United States and of the State of Colorado, and would impose an onerous burden and constitute an illegal interference with the interstate commerce traffic and business of this plaintiff in violation of the interstate commerce clause of the Federal Constitution, and impair the contract created between this plaintiff and its predecessors in interest and the United States government by virtue of the Acts of Congress heretofore set forth."

100 And on the trial of this cause and the argument of the same to the court, the plaintiff urged the contentions embraced in said allegation.

Finding of Fact Number Twenty.

That the plaintiff alleged in paragraphs XIV and XV of the complaint:

"That said Ordinance No. 34 of the Series of 1914, is unconstitutional, invalid, illegal, unlawful and void for the following reasons, among others, to-wit: It impairs the obligation of a contract, and impairs the contractual obligations and rights of the plaintiff in the premises in violation of the inhibition of section 10 of Article 1 of the Constitution of the United States; it impairs the obligation of a contract, and impairs the contractual obligations and rights of the plaintiff in the premises in violation of section 11 of Article II of the Constitution of the State of Colorado; it deprives the plaintiff of its vested property and rights and property rights in the premises without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; it denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; it deprives the plaintiff of its vested property and property rights in the premises without due process of the law in violation of section 25 of Article II of the Constitution of the State of Colorado; it takes the property and property rights of the plaintiff in the premises without just compensation in violation of section 15 of Article II of the Constitution of the State of Colorado; it operates as a burden upon and as an unlawful and unwarrantable regulation of and interference with interstate commerce and the transaction by the plaintiff of its interstate commerce business in violation of

section 8 of Article I of the Constitution of the United States; it is in conflict with and repugnant to the Act of the Congress of the United States approved March 3, 1875 (— Stats. —), entitled 'An Act to correct a clerical error in the Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company', approved June 8, 1872 (— Stats. —), entitled 'An Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company', hereinbefore set forth; and it is unnecessarily onerous and oppressive and is unreasonable and unfair and is unnecessarily drastic in character, and all inconvenience and danger to the public involved in the use of the track in question might readily be prevented by reasonable regulation of the use of such tracks in the operating of cars and trains and locomotives thereover without destroying the structure which has been lawfully constructed, laid, maintained and operated as aforesaid.

"That the defendants and each of them have threatened to and do threaten to, and unless restrained by the order and judgment of this Honorable Court will, with strong hand, remove the track maintained and operated by this plaintiff on said Wynkoop Street across said 17th Street, in the defendant City, as aforesaid, and the plaintiff has no means of preventing the execution of such threats, or the enforcement of said Ordinance No. 34 of the Series of 1914, except through the intervention of this Honorable Court; and the enforcement of said Ordinance No. 34 of the Series of 1914, and the execution of said threats by the attempt so to do will injure, impair, disturb, destroy and deprive this plaintiff of his property and rights and property rights in the premises, and the plaintiff's enjoyment and exercise of its rights, powers and privileges in the premises, and will interrupt, hinder, annoy and delay the plaintiff in the performance of its public duties to its patrons, and to the industries which have been built up in reliance upon the exercise of plaintiff's property rights in the premises, and will cripple and injure the said industries and would constitute a repudiation of the obligations of the defendants and each of them in the premises to the plaintiff's great ruinous and irreparable loss and damage, and would inflict upon this plaintiff a loss and damage and injury which could not be adequately estimated in damages and of a character for which no pecuniary damage would be an adequate compensation; and this plaintiff has no plain, speedy or adequate remedy at law, or any remedy at law, and has an adequate remedy only in a court of equity where matters of this nature are properly cognizable and reviewable; and said defendants and each of them are insolvent and pecuniarily irresponsible, and would not be able to respond in damages to this plaintiff for the recovery threatened as aforesaid; and the enforcement of said Ordinance No. 34 of the Series of 1914, and the execution of the threats to enforce the same, as aforesaid, would impair the contractual obligations and rights of the plaintiff in the premises in violation of section 10 of Article I of the Constitution of the United States, and in violation of section 11 of Article II of the Constitution of the State of Colorado, and would deprive this plaintiff of its vested

property and rights and property rights in the premises without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in violation of section 25 of Article II of the Constitution of the State of Colorado, and would deny to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and would constitute a taking of the property and property rights of the plaintiff in the premises without just compensation in violation of section 15 of Article II of the Constitution of the State of Colorado, and would operate as a burden upon and as an unlawful and unwarrantable regulation of and interference with interstate commerce, and the transaction by the plaintiff of its interstate commerce business in violation of section 8 of Article I of the Constitution of the United States, and would be an unlawful interference with the property and property rights of the plaintiff under and by virtue of the Acts of the Congress of the United States, approved March 3, 1875 — Stats. —), entitled 'An Act to correct a clerical error in the Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company, approved June 8, 1872', and the Act of the Congress of the United States approved June 8, 1872 (— Stats. —), entitled 'An Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company', hereinbefore set forth, and would unnecessarily, oppressively, unreasonably and unfairly destroy the property and rights of this plaintiff in the premises without any corresponding benefit of right to the public or the protection of the public in the premises".

And on the trial of this cause and the argument of the same to the court, this plaintiff urged the contentions embraced in said allegations.

Finding in Fact Number Twenty-one.

That the plaintiff in the complaint in this cause prayed:

"Wherefore Plaintiff prays judgment as follows:

"1. That this court will make and enter of record herein its judgment or decree adjudging and declaring said Ordinance No. 34 of the Series of 1914 unconstitutional, illegal, unlawful and void, and of no force and effect, for the following reasons, among others, to-wit: it impairs the obligation of a contract, and impairs the contractual obligation and rights of the plaintiff in the premises in violation of the inhibition of section 10 of Article I of the Constitution of the United States; it impairs the obligation of a contract, and impairs the contractual obligations and rights of the plaintiff in the premises in violation of section 11 of Article II of the Constitution of the State of Colorado; it deprives the plaintiff of its vested property and rights and property rights in the premises without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; it denies to the plaintiff the equal protection of the laws in violation of the Four-

teenth Amendment to the Constitution of the United States; it deprives the plaintiff of its vested property and property rights in the premises without due process of the law in violation of section 25 of Article II of the Constitution of the State of Colorado; it takes the property and property rights of the plaintiff in the premises without just compensation in violation of section 15 of Article II of the Constitution of the State of Colorado; it operates as a burden upon and as an unlawful and unwarrantable regulation of and interference with interstate commerce and the transaction by the plaintiff of its interstate commerce business in violation of section 8 of Article I of the Constitution of the United States; it is in conflict with and repugnant to the Act of the Congress of the United States, approved March 3, 1875 (— Stats. —), entitled "An Act to correct a clerical error in the Act granting a right of way though the public lands to The Denver and Rio Grande Railway Company, approved June 8, 1872", and with the Act of the Congress of the United States, approved June 8, 1872 (— Stats. —), entitled "An Act granting a right of way through the public lands to The Denver and Rio Grande Railway Company", hereinbefore set forth; and it is unnecessarily onerous and oppressive, and is unreasonable and unfair, and is unnecessarily drastic, in character, and all inconvenience and danger to the public involved in the use of the tracks in question might readily be prevented by reasonable regulation of the use of such tracks in the operating of cars and trains and locomotives thereover without destroying the structure which has been lawfully constructed, laid, maintained and operated, as aforesaid."

Finding of Fact Number Twenty-two.

And also that the plaintiff in the complaint in this cause prayed:
 "3. That this court will grant unto the plaintiff its temporary writ of injunction issued out of and in accordance with the rules and practice of this Honorable Court, to be directed to the defendants herein, and each of them, commanding said defendants, and each of them, and the respective successors in office of them, and each of them, and the officers, deputies, servants, agents, employes, associates, attorneys, counselors, and solicitors, of them and each of them, and any and all persons acting in aid or assistance of them, and each of them, or any of them, or under the authority, direction, sanction or control of them, and each of them, absolutely to desist and refrain from, and enjoining and restraining the defendants, and each of them, and all persons aforesaid, from directly or indirectly doing, procuring or suffering to be done any act under said Ordinance No. 34 of the Series of 1914, or under the authority or sanction thereof, or from enforcing or attempting to enforce said Ordinance No. 34 of the Series of 1914, or any part thereof, or from removing, obstructing, or in any manner molesting or interfering, for any purpose whatsoever, with said tracks maintained and operated by the plaintiff on said Wynkoop Street across said 17th Street in the

106 defendant City, or in any manner, or for any purpose molesting or interfering with this plaintiff in the exercise and enjoyment of its rights, powers, privileges and franchises in the premises pending this action, and that thereupon said injunction be made perpetual."

Conclusions of Law.

The Court doth further find the following conclusions of law viz:

1. That the plaintiff has the lawful right to occupy said Wynkoop Street at its intersection with said Seventeenth Street with its said track.

2. That said Ordinance No. 34 of the Series of 1914 is invalid, illegal, unlawful and void.

3. That a writ of injunction should be and is hereby issued out of this court directed to the defendants herein, and each of them commanding said defendants, and each of them, and the respective successors in office of them, and each of them, and the officers, deputies, servants, agents, employes, associates, attorneys, counselors, and solicitors, of them and each of them, and any and all persons acting in aid or assistance of them, and each of them, or any of them or under the authority, direction, sanction or control of them and each of them, absolutely to desist and refrain from and perpetually enjoining and restraining the defendants, and each of them, and all persons aforesaid, from directly or indirectly doing, procuring or suffering to be done any act under said Ordinance No. 34 of the Series of 1914, or under the authority or sanction thereof, or from enforcing or attempting to enforce said Ordinance No. 34 of the Series of 1914, or any part thereof, or from removing, said track maintained and operated by the plaintiff on said Wynkoop Street across said 17th

107 Street in the defendant City or attempting so to do; reserving, however, to the defendants the right after the date of the expiration of the charter of the said The Denver and Rio Grande Railway Company on October 27, A. D. 1920, to have determined by appropriate judicial proceedings the question whether the rights, powers and privileges of the plaintiff, or its successors, in the premises, extend or continue beyond said last mentioned date.

Let judgment or decree be entered accordingly.

By the Court:

CHAS. C. BUTLER,

Judge of the District Court of the State of Colorado within and for the City and County of Denver in the Second Judicial District.

Nov. 13, 1914.

Respectfully prayed and requested:

E. N. CLARK,

R. G. LUCAS,

Attys. for Plaintiff.

Service of a copy of the foregoing Requests for Findings of Fact and Conclusions of Law is hereby admitted on this 7th day of November A. D. 1914.

I. N. STEVENS,
GEO. Q. RICHMOND,
JACOB J. LIEBERMAN,
Attorneys for Defendants.

108 And thereupon, and on to-wit the same day (November 13, 1914) the following further proceedings, inter alia, were had and entered of record in said court, to-wit:

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, etc.,

vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

At this day come the parties hereto, by their attorneys, respectively, and thereupon on plaintiff's motion,

It is ordered by the Court that the findings of fact and conclusions of law of the Court be entered herein.

109 And afterwards, and on to-wit the 10th day of December, A. D. 1914, the following further proceedings, inter alia, were had and entered of record in said court, to-wit:

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, etc.,

vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

And thereupon on motion of said defendants time and until five days from this day is allowed said defendants within which to file their motion for a new trial herein.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, etc.,

vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

At this day come the parties hereto, by their attorneys, respectively, and thereupon on plaintiff's motion,

It is ordered by the Court that a decree be entered in accordance with the finding of the Court, and let the same be recorded in the Judgment Book.

110 And thereupon, and on to-wit the same day (December 10, 1914) the following further proceedings, inter alia, were had and entered of record in the Judgment Book of said Court, to-wit:

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,

VS.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver.

Injunction Pendente Lite.

This cause coming on to be heard upon the pleadings and the stipulation as to facts herein and the proofs taken herein, and upon the findings of fact and conclusions made and entered by the Court herein, and for final decree thereupon, and counsel having been heard and the Court being sufficiently advised in the premises: Now, therefore,

1. It is considered, ordered, adjudged and decreed that the above named plaintiff, The Denver and Rio Grande Railroad Company, has the lawful right to occupy Wynkoop Street at its intersection with Seventeenth Street, in the City and County of Denver, in the State of Colorado, with its, said plaintiff's railroad track there located and existing; and it is further

2. Considered, ordered, adjudged and decreed that the ordinance passed, adopted or enacted by the Council of the defendant City and County of Denver, on March 30th, A. D. 1914, known as "Ordinance No. 34, Series 1914, Commissioner Bill No. 31, introduced by Commissioner Hunter," the same being entitled

111 "A bill for an Ordinance repealing Ordinance No. 60 of the Series of 1886, and Ordinance No. 9 of the Series of 1871, and Ordinance No. 7 of the Series of 1886, and Ordinance No. 63 of the Series of 1892, and all other ordinances or parts of ordinances in conflict herewith, and providing for the elimination of all railway tracks at the Seventeenth Street crossing where the same intersects Wynkoop Street in the City and County of Denver, and providing for the removal of all said tracks at said Seventeenth Street crossing by The Denver and Rio Grande Railroad Company and The Union

Pacific Railway Company, or by the Commissioner of Improvements," is invalid, illegal, null and void; and it is further

3. Considered, Ordered, Adjudged and Decreed that the above named defendants, and each of them, and the respective successor or successors in office of them, and each of them, and all the officers, deputies, servants, agents, employes, associates, attorneys, counselors and solicitors of them and each of them, and any and all persons acting with or in aid or assistance of them, and each of them, or any of them, or by, with or under the authority, direction, sanction or control of them and each or any of them, be and they hereby are restrained and enjoined, and commanded absolutely to desist and refrain from, directly or indirectly, doing, procuring or suffering to be done any act under said ordinance passed, adopted or enacted by the Council of the defendant City and County of Denver, on March 30th, A. D. 1914, known as "Ordinance No. 34, Series 1914, Commissioner Bill No. 31, introduced by Commissioner Hunter," the same being entitled "A bill for an Ordinance repealing Ordinance No. 60 of the Series of 1886, and Ordinance No. 9 of the Series of 1871, and Ordinance No. 7 of the Series of 1886, and Ordinance No. 63 of the Series of 1892, and all other Ordinances or parts of Ordinances in conflict herewith, and provid-

112 ing for the elimination of all railway tracks at the Seventeenth Street crossing where the same intersects Wynkoop Street in the City and County of Denver, and providing for the removal of all said tracks at said Seventeenth Street crossing by The Denver and Rio Grande Railroad Company and The Union Pacific Railway Company, or by the Commissioner of Improvements," or any part thereof, and from removing the railroad track maintained and operated by the above named plaintiff on said Wynkoop Street across said Seventeenth Street, in said City and County of Denver, State of Colorado, or attempting so to do; reserving, however, to the defendants the right after the date of the expiration of the charter of The Denver and Rio Grande Railway Company on October 27, A. D. 1920, to have determined by appropriate judicial proceedings the question whether the rights, powers and privileges of the above named plaintiff, or its successors, in the premises, extend or continue beyond said last mentioned date; and it is further

4. Considered, Ordered, Adjudged and Decreed that the above named plaintiff do have and recover of the above named defendants, its costs in this cause.

Dated this 10th day of December, A. D. 1914.

By the Court:

CHAS. C. BUTLER,

Judge of the District Court of the State of Colorado within and for the City and County of Denver, in the Second Judicial District.

113 And afterwards, and on to-wit the 15th day of December, A. D. 1914, came the defendants by their attorneys and filed herein their Motion for a New Trial.

And said Motion for New Trial is in words and figures as follows, to-wit:

Filed in District Court, City and County of Denver, Colo., Dec. 15, 1914. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. III.

No. 57865.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, et al.,
Defendants.

Motion for New Trial.

Come now the defendants in the above entitled cause, by their attorneys, and move this Honorable court for a new trial in the above entitled action, on the following grounds, to-wit:

I.

For the reason that the court erred in its findings of fact, in this:

a. In finding, as a part of finding of fact No. 6, that The Denver & Rio Grande Railway Company duly accepted the provisions of ordinance No. 9 of the Series of 1871.

b. In making the following finding in finding of fact originally numbered 12 but changed by the court to No. 11:

114 "Among the industries so built up, as aforesaid, and so served by this plaintiff and its predecessors in interest, as aforesaid, are prominent and important lumber industries, mercantile interests, machinery interests, mining and milling supply company interests, and other interests, all of vast public importance to the commercial and financial interests of the defendant city, and the public at large."

c. In using the descriptive term "large" in finding of fact originally numbered 13, but changed by the court to 12, in describing the various industries bordering and adjoining Wazee Street, on which the track in question lies.

d. In making finding of fact originally numbered 16, but changed by the court to No. 15.

e. In making and entering findings of fact originally numbered 19 to 23 inclusive, but changed by the court to 18 to 22 inclusive, and treating same as findings of fact.

II.

For the reason that the court erred in its findings and conclusions of law in this:

a. In holding that the plaintiff has the lawful right to occupy Wynkoop Street at its intersection with Seventeenth Street with its said track.

b. In holding that ordinance No. 34 of the Series of 1914 is invalid, illegal, unlawful and void.

c. In holding that a writ of injunction should be issued.

d. In issuing said writ of injunction.

e. In taxing or assessing the costs of the action to the defendant.

III.

For the reason that the judgment of the court is contrary to the facts and the law.

115

I. N. STEVENS,
GEO. Q. RICHMOND,
JACOB J. LIEBERMAN,
Attys. for Defendants.

And thereupon, and on to-wit the same day (December 15th, A. D. 1914) the following further proceedings, inter alia, were had and entered of record in said court, to-wit:

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, etc.,
vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

At this day come the parties hereto by their attorneys respectively, and thereupon this cause coming on to be heard upon defendants' motion for a new trial, the same is submitted without argument by counsel and the Court being now sufficiently advised in the premises, doth deny said motion.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, etc.,

vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

At this day come the said defendants by their attorneys, and on their motion;

It is ordered by the Court that the issuance of execution herein be, and the same hereby is, stayed for the period of thirty days from this day.

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No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, etc.,

vs.

CITY AND COUNTY OF DENVER, etc., et al.

Injunction Pendente Lite.

At this day come the said defendants by their attorneys. And on their motion time and until 60 days from this day is allowed said defendants within which to prepare and tender to the Judge of this court, their bill of exceptions by them reserved herein, which when signed and sealed by said Judge shall be filed herein as of this day.

117

STATE OF COLORADO,

City and County of Denver, ss:

In the District Court, Second Judicial District, Div. III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Be it remembered that heretofore on Thursday the 27th day of August, A. D. 1914, the same being one of the juridical days of the regular April A. D. 1914 term of said court, this matter came on for trial at the court house in Denver, in said county, judicial district and state, before Honorable Charles C. Butler, regular district judge of said judicial district, without a jury.

Appearances:

For the plaintiff, Elroy N. Clark, Esq., and R. G. Lucas, Esq.

For the defendant, George Q. Richmond, Esq., and J. J. Lieberman, Esq.

118 Mr. Richmond: We have two witnesses we desire to introduce for the purpose of proving certain issues, certain facts we have alleged in our answer with reference to switching privileges in the yards around the Union Depot. I think we might introduce those now, or at least have them sworn, before we make a statement to the court, if it is agreeable to the other side. One is superintendent of the Union Pacific, and the other is an engineer.

Mr. Lucas: Before the plaintiff formally answers ready in the case, I want to suggest that we are apprehensive that because of the possible future course of this litigation it might be desirable, in fact actually necessary, that the court make specific findings of fact, and to that end, we want to reserve the right, after the submission of the case, to make request for findings if necessary.

Mr. Richmond: I have no objection to that.

The Court: This is coming up upon final hearing, is it?

Mr. Richmond: This is an application; your honor in determining this case will determine on the final hearing now as though temporary injunction had been granted.

The Court: This is practically the final hearing.

Mr. Richmond: That is my understanding.

The Court: Very well. You may call your witnesses, as there seems to be no objection.

119 A. F. VICK ROY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Richmond:

Q. State your name?

A. A. Vick Roy.

Q. What is your business?

A. Superintendent of the Union Pacific Railroad of Denver.

Q. How long have you been occupying that position?

A. Seven years.

Q. You are familiar with the questions involved in this suit, in which you have been subpoenaed as a witness; that is to say, as to the 17th Street crossing on Wynkoop Street?

A. Yes sir.

Q. The purpose of calling you is with a view of interrogating you with regard to switching facilities which the Denver and Rio Grande Railroad Company may use or could use or arrange for with the Union Pacific Railway Company. I will ask you to state what facilities they can use or obtain from you in lieu of the 17th Street crossing.

Mr. Lucas: We object upon the ground that this case, upon that feature of it, must be determined upon the facilities as they at present exist, and it is not within the province of this witness to be permitted to speculate and state his opinion as to what may or may not take place in the future. We also object further upon the ground

that it does not appear that this witness as the superintendent of the Union Pacific Railroad Company would have any power to bind that company by such an arrangement as he might possibly testify to

The Court: The objection will be overruled; there is no jury here to be confused. You may argue the points.

120-21 Q. (Question read.) What are the existing facilities there, eliminating the 17th Street crossing?

A. Would it be in order for me to sketch out on this blackboard just the conditions as they exist now so as to make an explanation that will be more intelligent than trying to describe something that cannot be described?

The Court: I see no objection to that.

(The witness here made a sketch on the blackboard.)

Mr. Lucas: I would suggest if that be done the witness be directed later to make a drawing corresponding with what he puts upon the blackboard, in order that we might supplement the record.

The Witness: We can furnish a blue print if it is desired. I am only doing this simply to explain. There is no use talking here unless I can tell what the conditions are.

Mr. Lucas: We just wanted the record to show that whatever he puts on the board—

The Court: Yes, what will be shown on the blackboard will be made a part of the record.

Mr. Richmond: We will put in a blue print and file it.

The Witness: This is Wynkoop street, extending from 19th to 16th street, and for the extension beyond 16th Street I can draw another diagram here later. (Witness indicating on diagram on blackboard.)

(Here follows blue-print marked p. 122.)

Concrete Wall

CREEK

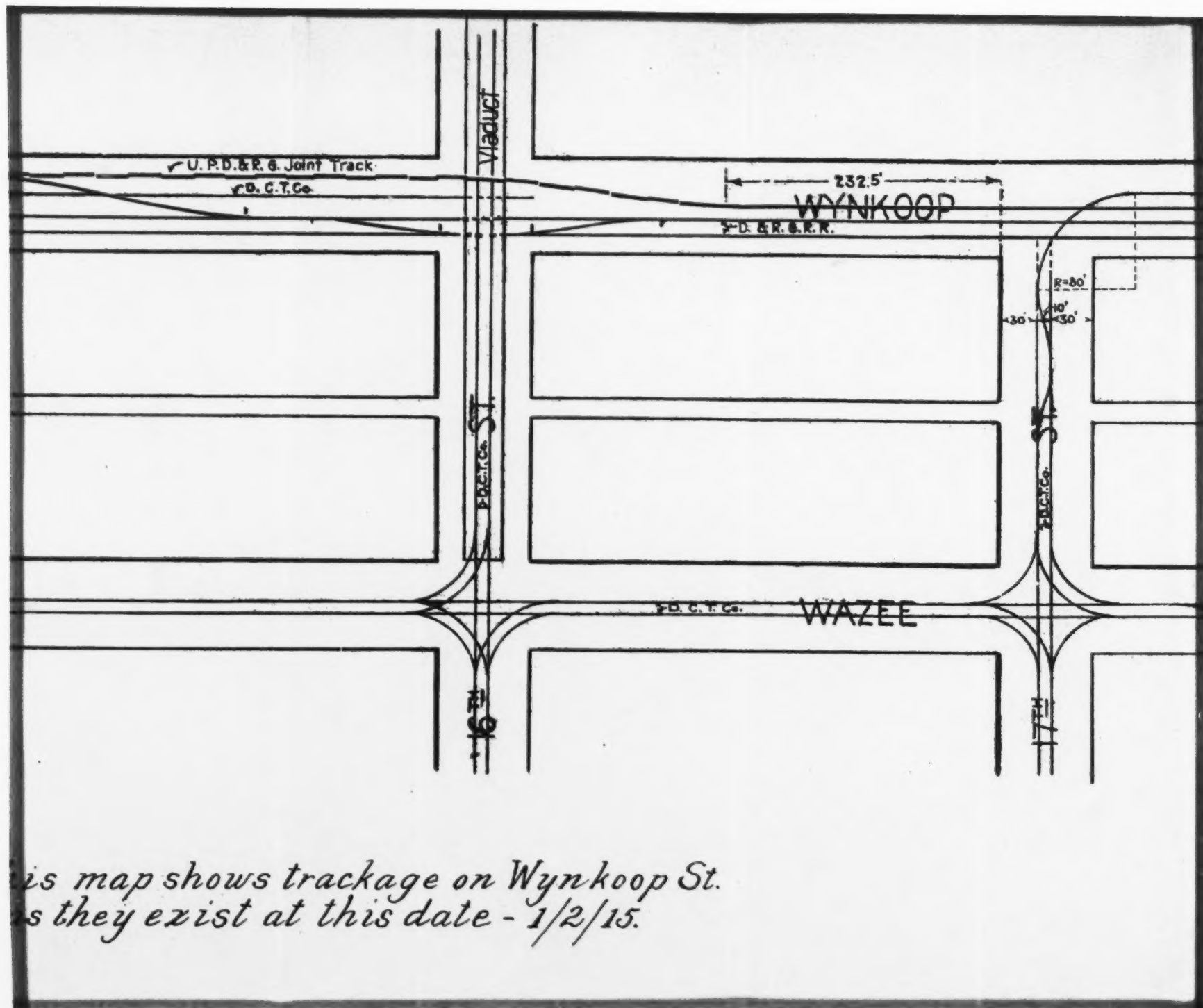
Concrete Wall

CHERRY

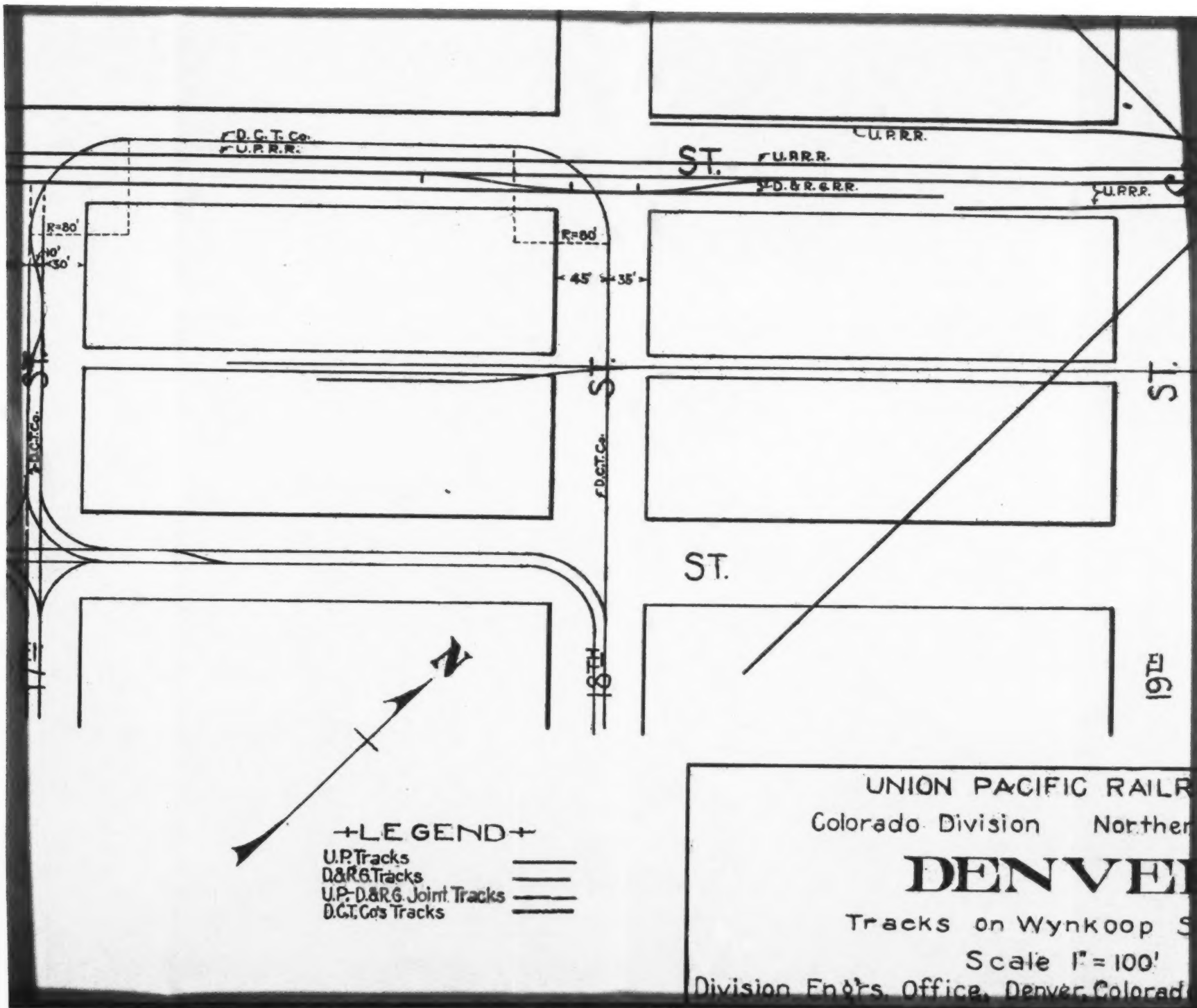
90'

No. 801.
Denver & Rio
Grande Ry. Co.
- vs -
The City and
County of Denver.

\$122.



This map shows trackage on Wynkoop St.
as they exist at this date - 1/2/15.



+LEGEND+

- U.P. Tracks
- D.&R.G. Tracks
- U.P.-D.&R.G. Joint Tracks
- D.C.T. Co's Tracks

UNION PACIFIC RAILROAD
Colorado Division Northern

DENVER

Tracks on Wynkoop St

Scale 1" = 100'

Division Engrs. Office, Denver, Colorado

123 This is Wynkoop Street, the first track here towards the Union Depot, and all of this is Union Depot ground. Track No. 1 is a running track belonging to the Union Pacific Railroad; that comes from the yard up here between 19th and 28th streets, and this track does not reach any industry from 19th to 16th street. It runs along the property of the Union Depot Company, but is used to reach a joint track of the Union Pacific Railroad, owned jointly with the Denver & Rio Grande, between 16th and 14th streets. That joint track is an industry track where there are several very substantial industries located. This then is ordinarily a dead track and not used for anything except simply to lead over to these industries.

Track No. 2 is a running track belonging to the Denver & Rio Grande Company and used for many years to pull exchange freight out of the Union Pacific yard that was to be delivered to the Denver and Rio Grande Company. Their engines come over into our yard to get those cars. We assemble them in our yard on a designated track. They would come over this way, get the cars and haul them back into their yard through Wynkoop street. The track is also used, as we term it, as a lead track out of their yard over into West Denver, beyond 14th Street, between 14th and 7th, to bring up cars up here to these industries on the town side of Wynkoop street, principally Brown Brothers and Hendrie and Bolthoff and the other industries between 17th and 14th streets.

The Denver & Rio Grande own the track that serves the industries between 19th and 17th streets; the Union Pacific has absolutely no right on those tracks. The tracks, however, are there. The Union Pacific engines can come in there just the same as Rio Grande engines, if the Union Pacific get the required permission or authority.

But we never go in there now; we have no business there.

124 There is one little spur that comes in here, as shown here (indicating on said diagram). This is a Union Pacific spur; it only reaches back there about a hundred feet and serves Best and Company's plant on the corner of 19th and Wynkoop, a little short spur. The Denver & Rio Grande Company's track runs off here, and they serve all of these houses, Hendrie and Bolthoff and Brown Brothers, etc. We do no switching on this track now, No. 1 track, we do not take any cars over 17th Street to the industries that we have a joint right to serve because of the order from the city of Denver that we discontinue switching across 17th street. We discontinued, I think, on the 16th day of last March, since which time we have been getting a great many cars into Denver over our railroad that come to those industries between 16th and 14th streets, but we deliver all of the cars to the Denver & Rio Grande Railroad Company, and they haul the cars out of our yard on the transfer track around this way (indicating), through the Union Depot and over into their own yard and then they push them back into these industries over here, and do this switching of our cars to that part of the town.

As to the use of 17th street, if you are going to cut that out entirely and have no tracks over there, the result would be that the Rio Grande would then have to do what we are doing today with them, by having them do our switching on the other side of 17th street, from

7
5

17th down to 14th. They would then have to give us their cars to pull back through the depot into our yard and push them into these industries. It would simply be an exchange. But the question would arise, as the attorney says here, what right would the Union Pacific Company have to push the cars in to these industries over the Rio Grande Railroad's track? Of course, the Rio Grande is separated from their track by taking out 17th street, so they cannot get to it; there is no way in the world they can get into these tracks unless they do come this way, except to give someone else the business. Take the business around here, after we do get it, we have got to acquire a right from the Denver and Rio Grande to put cars into these industries, which right we do not have at the present time.

The reason that they can take our cars to the industries between 16th and 14th streets on Wynkoop at the present time is because they own a one-half interest in that track; we have the other half; we are joint users of the track in question. But we are not joint users of this industry track here (indicating). This industry track here perhaps does twice as much business as the one between 16th and 14th streets—just about twice as much at the present time. There are more cars go into these big industries here than to the industries between 16th and 14th streets, but it is entirely possible to do the switching that way. Somebody would have to give the Union Pacific the right to get into those tracks.

Q. In regard to the time, are you familiar with the time that the Denver and Rio Grande is now utilizing 17th street, the time of the days?

A. They have advised me that they are doing switching over 17th street between nine and six o'clock in the morning.

Mr. Lucas: We want to interpose an objection on the ground that it is hearsay, does not appear who advised him or that the official of the railroad who purported to advise him had any authority.

The Court: Objection sustained unless it is shown that he was advised by somebody having authority.

Mr. Richmond: I thought that was practically admitted.

Mr. Lucas: I do not know what he is going to say.

By Mr. Richmond:

Q. From whom did you get the information?

126 A. From Mr. Ridgway, I believe he is the chief engineer, or assistant, of the Denver and Rio Grande Company.

Q. Is he familiar with the location and situation of the business being done there?

A. He ought to be.

Mr. Richmond: Is the objection still insisted upon.

Mr. Clark: He is not an operating man, he is an engineer; I do not know whether he knows about the operation of the trains.

Mr. Richmond: I have your petition to the city council which states you are only using it between six and twelve, so that I will produce that this afternoon, if you insist upon this objection.

Mr. Lucas: I think that matter will perhaps be better evidence from a witness.

The Court: Objection sustained.

Mr. Lieberman: We save an exception.

By Mr. Richmond:

Q. Now, if that track was taken out at the 17th Street crossing I am advised by you that under such provisions as may be entered into between you and the Rio Grande Railroad—wait a minute, because this is in your stipulation, every bit of it, as to the facts—relative to those switching facilities there, and now insofar as the time is concerned, would it take any extraordinary length of time to switch around the way you have suggested there in preference to taking it across 17th street; could it be done just as readily?

A. Not quite as readily: if you assume that 17th street is open for switching at any time, not between the hours of twelve and six, but any time in the twenty-four hours, then it would be a delay to the carload freight to be taken around through a transfer into the Union Pacific yard and then switched into these industries, I would say perhaps maybe two or three hours.

Q. Assuming it is only utilized between six and twelve, what would you say then?

A. Well, it would be an advantage to do it the other way, that is, to have entrance into those industries at any time during the twenty-four hours and not restrict it to six hours in twenty-four.

Mr. Richmond: I think that is all.

Cross-examination.

By Mr. Clark:

Q. Mr. Vick Roy, you do not intend to imply by your testimony that the only matter of interest to the Denver & Rio Grande Railroad Company in this matter is the mere expense which the Denver Company would be put to in employing your company to switch this traffic from its tracks into these industries on Wynkoop, do you?

A. No, sir, because—

Q. As a matter of fact, were the Denver Company required to turn this business destined to points on Wynkoop between 17th and 19th, and business originating at those points over to the Union Pacific for the purpose of switching, it would ultimately mean the transfer of that business to the Union Pacific Company, would it not?

A. Well, I could not say that, Mr. Clark, I do not know what the future would bring out.

Q. You are an experienced railroad man, Mr. Vick Roy, and do you not know it to be a fact that the business between 17th and 19th on Wynkoop street would not submit to that roundabout way of doing business if they could do it direct with your company—is not that true?

A. I believe there would be a certain amount of that, perhaps

not any greater amount than now is being switched to your railroad because of our inability to switch over 17th street and
128 giving you our business to go to industries between 16th and 14th streets; it would be about a stand-off, I think.

Q. It is a fact, is it not, within your knowledge, that the Denver company handles in the neighborhood of a thousand cars a year into and out of those industries on Wynkoop between 17th and 19th streets?

A. I think the check we made of that was last year they handled about seven hundred and fifty or seven hundred and sixty cars.

Q. Your company, on the other hand, handles to points on the joint track between 16th and Cherry Creek somewhere between three hundred and four hundred a year?

A. Yes, sir.

Q. This business handled by the Denver Company to and from those industries on Wynkoop street originates in the main at Missouri River points, does it not, or points east of there?

A. I am not very familiar with the traffic handled there, Mr. Clark, but I believe you are correct.

Q. And is it also true that a considerable portion of the outbound business from those same points goes to Missouri River points or to other interstate points?

A. I think it is almost exclusively distributed from those wholesale houses to points in Colorado, and it takes the different lines it is distributed to; it certainly does not go back to Missouri River points; they do not ship stuff back there when they get it from there.

Q. Considerable quantities of it go to New Mexico and Utah points and other interstate points?

A. Yes, sir, naturally it would go—

Q. The amount of inbound business to those points greatly exceeds the outbound business from them, does it not?

A. I do not know, but I would judge so.

Mr. Richmond: I think we will interpose an objection in regard to that now, owing to the fact that it is not proper cross-examination. If this is a part of their proof, if they want to put it
129 in, I think they should put it in.

The Court: Objection sustained.

Mr. Clark: We save an exception.

Q. Is it not your judgment, Mr. Vick Roy, that if the inbound business to those points had to be handled from D. & R. G. tracks through transfers to destination on those tracks that the long haul on that business would naturally go to the Union Pacific Company instead of its coming in over D. & R. G. and Missouri Pacific lines?

Mr. Richmond: I object to that as not proper cross-examination.

The Court: Objection overruled. He may answer.

Mr. Lieberman: We save an exception.

A. I believe that a traffic man could answer that question better than I can, Mr. Clark. I can only surmise what the effect would

be by putting myself in the position of a shipper or receiver of these goods. I naturally would want the freight to be available at the earliest possible moment when it arrived at Denver, and if I could get it quicker over the Union Pacific railroad I believe I would get it that way.

Q. Seventeenth Street lies between Cherry Creek and Nineteenth street, does it not, Mr. Vick Roy?

A. Yes sir.

Q. And parallels Sixteenth, Eighteenth and Nineteenth?

A. Yes sir.

Q. And tracks west or north of Wynkoop, until you get beyond the grounds of the Union Depot, are owned and controlled by the Union Depot Company, are they not?

A. West and north.

Q. Yes.

A. Yes, on the west and north side of Union Depot they are owned and controlled between Sixteenth and Eighteenth Streets by the Union Depot Company, and now between Fifteenth and Nineteenth Streets by the new Depot Company.

Q. Are those the transfer tracks that you referred to?

A. The Union Depot tracks.

130 Q. Are the transfer tracks that you referred to within the Union Depot Company's terminals?

A. No sir.

Q. Those transfer tracks lie to the north of the Union Depot Company's property?

A. Mr. Clark, the Denver and Rio Grande road set aside a transfer track in their yard between Seventh and Eleventh Streets that they place on that track all of the cars that go to the Union Pacific; the Union Pacific sends a switch engine from their yard at Twenty-sixth Street over to the D. & R. G. yard, into that track, to couple onto those cars, and haul them back to the Union Pacific yard. Now, the D. & R. G. do exactly the same thing in getting freight from the union Pacific, they send an engine from their yard into the Union Pacific yard to get the cars that we turn over to the Denver and Rio Grande.

Q. All I am getting at is the route.

A. They take the route at the present time through the Union Depot tracks, there is a running track set apart through the Union Depot for that purpose.

Q. Will that arrangement continue after the present Union Depot arrangement goes in full operation?

A. Well, it is intended now that way. I would like to see it taken out of the Union Depot and put around some other way if we can find a way.

Q. If you can find a way?

A. Yes sir.

Q. But all those tracks extending across the premises of the Union Depot Company will be absolutely subject to the control of the Union Depot Company, will they not?

A. Yes sir.

Mr. Clark: I think that is all.

The Court: Will either side need this witness any further?

131 Mr. Richmond: The other witness would testify to practically the same thing Mr. Vick Roy does, and so we will not call him. We are ready to take up the submission of facts as practically agreed upon in this case, unless counsel want to make a statement.

(Witness excused.)

132 Mr. Lucas: The plaintiff desires to introduce in evidence at this time certain provisions of a stipulation.

Mr. Richmond: Do you wish to introduce that in evidence? I do not understand the stipulation becomes evidence.

Mr. Lucas: You say witnesses would testify so and so, that is really the stipulation.

Mr. Richmond: A stipulation is placed on file, not as evidence.

Mr. Lucas: I just want to read it to the Court anyway.

The Court: When this matter came on for hearing before I read all these pleadings; this morning I had an opportunity of reading the complaint, but I did not read the answer or replication again, I just thought I would mention that so that you may be as specific as you wish in your statement.

Mr. Lucas: Out of abundance of caution we better go through the formality of reading the stipulation into the record.

Mr. Richmond: That is agreeable. I would like to shorten the time we occupy the Court's attention. I am assuming that we have our case reasonably well briefed, and I would assume after an orderly statement of the facts, and a submission of questions in as brief time as can possibly be done, we can submit the case to the Court with the briefs and let the Court determine at its earliest convenience.

Mr. Lucas: Suppose we just say that the stipulation marked in evidence is the joint evidence of both parties?

Mr. Richmond: It is not joint evidence. It is a stipulation as to what these witnesses would testify to if they were on the stand. The Court can accept it as such.

The said stipulation was marked "Exhibit A," and is in the words and figures following, to-wit:

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57865.

EXHIBIT A.

"STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. No. 3.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation; J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Stipulation to Admit Facts and Documents.

It is hereby stipulated and agreed by and between the respective parties hereto, and all of them, by and through their respective counsel as follows:

(a) That—for the purposes of and upon any trial or hearing of the above entitled cause—the parties hereto admit that their respective witnesses would offer, identify and prove the documents hereinafter named and set forth, and testify to the facts and statements hereinafter set forth, and the parties hereto may have the further right to put on such witnesses and introduce such testimony as they may deem advisable or find necessary in and at the hearing
134 of this cause in support of their pleadings; and

(b) That all such documents, and all extracts therefrom, hereinafter mentioned, described, set forth, quoted or referred to, shall be deemed and taken to be and shall be used as true copies of the same, without further proving the same, and may be read in evidence on any trial of this cause as primary and the best evidence thereof and not as secondary evidence, and that the original documents, or certified exemplified copies thereof, shall not be required to be produced or any evidence as to the same or the custody thereof or the non-production thereof; and,

(c) Said facts, documents and extracts therefrom are as follows:

1. That the date of the incorporation of The Denver and Rio Grande Railway Company in the complaint herein mentioned, was October 27, 1870, instead of October 29, 1870, and that paragraph

IV of said Complaint may be and hereby is amended to read accordingly.

2. That a true copy of the certificate of incorporation of said The Denver and Rio Grande Railway Company is as follows:

"Certificate of the Denver and Rio Grande Railway Company.

"Whereas, we, the undersigned, desire to form a company and to become a body corporate under and by virtue of the provisions of chapter eighteen (18) of the revised statutes of the Territory of Colorado, for the objects and purposes hereinafter set forth; now, therefore, this is to certify as follows, viz:

"1. That the corporate name of said company shall be the Denver and Rio Grande Railway Company.

135 "2. That the object of said company is to located, construct, operate, and maintain certain railways and telegraph lines hereinafter named and described, and to acquire, improve, and dispose of lands or any interests therein, either absolutely or conditionally, for the purpose of aiding in the construction and business of said railways and telegraph lines, and in manner promoting the interests of the same. The said railways and telegraph lines are named, described, and by routes are designated as follows:

"1. The Denver and Rio Grande Railway.

"The route of this railway is described as follows: Commencing at Denver, Colorado Territory, thence running up the Valley of the South Platte River, on the southeast side thereof, to a point at or near the mouth of Plum Creek; thence up the Valley of Plum Creek to a point at or near the forks of East Plum Creek and West Plum Creek; thence up the main East Branch of Plum Creek Valley, to the lake in township eleven (11), range sixty-seven (67) west, on the crest of the ridge dividing the waters of Plum Creek and Monument Creek; thence down the Valley of the Monument Creek to a point at or near the junction of the Valleys of the Monument and Fontaine qui Bouille, or to a point in the Fountain valley below the mouth of the Monument, if the detailed surveys shall determine the latter to be most eligible; thence by the Valley of the Fountain, or across its west tributaries, to such a point on the Arkansas River at or above Pueblo, as may be found upon a detailed survey to be the most eligible for intersecting the same; thence up the Valley of the Arkansas River to a point at or near Canon City; thence continuing up the Valley of the Arkansas through the big canon of the same to a point at or near the mouth of the South Arkansas River; thence by the valley or adjoining slopes of the South Arkansas River and
136 of the Puncho Creek to the summit of the divide between the waters of the Arkansas and the San Luis Park, known as Puncho Pass; thence by the most eligible route in a general southerly direction down the San Luis Valley to the Valley or the Rio Grande del Norte; thence in a general southerly direction, by the particular

route which may be determined upon a detailed survey to be the most eligible, down the Valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the Valley of the Rio Grande, on either side of the river as may be found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or united with and operating any connecting railway in the Republic of Mexico.

"2. The Denver and Southern Railway.

"Commencing at the most eligible point on said Denver and Rio Grande Railway in the Valley of the Arkansas, or of the Fountain, and running in a general southerly direction to the base of the Spanish Range of the Rocky Mountains; and thence, crossing said Range by the Sangre de Christo, Cucharas, Las Animas, or such other pass as detailed survey may determine to be the best, to the Valley of the Rio Grande; thence down the Valley of the Rio Grande to a connection with the Denver and Rio Grande Railway, or to El Paso.

"3. The South Park Railway.

"Commencing at a point, on the said Denver and Rio Grande Railway, in the Valley of the South Platte River, at or near the mouth of Plum Creek; thence up the Valley of the South Platte River, to the mouth of its big canon; thence through said big canon and up the Valley of the South Platte to the South Park, still following up the Valley of the South Platte to a point at or near the town of Fair Play; thence across the 'Continental Divide', by 137 the Hoosier, Hamilton, or other pass to the Valley of the Blue; thence by such route as may be found most eligible, with a view of developing the mineral and agricultural wealth of Western Colorado, to the western border of Colorado; and thence, by the most eligible route to Salt Lake City, with a branch from said railway, at or near the intersection of the Salt Branch with the South Platte, to the salt works.

"4. The Western Colorado Railway.

"Commencing at a point on said Denver and Rio Grande Railway at or near the mouth of the South Arkansas River; thence up the Valley of the main Arkansas to the summit of the range dividing the waters of the Arkansas and the Grande River of the west; thence by the Valley of the Grande, or such other tributary of the Great Colorado River as may be found most practicable and eligible, with a view of developing the mineral and agricultural wealth of Western Colorado, to a point on the western border of Colorado, and thence by the most eligible route to Salt Lake City.

"5. The Moreno Valley Railway.

"Commencing at a point on said Denver and Rio Grande Railway, at or near the mouth of the Costillo, or such other eastern tributary of the Rio Grande as may be found most eligible, and to extend up said Costillo or most practicable valley to the mines and pineries of the Maxwell estate.

"6. The San Juan Railway.

"Commencing at a point on the said Denver and Rio Grande Railway, near or accessible to the Valley of the Chama, or such other western tributary of the Rio Grande as may be found most eligible, and to extend thence, by such most eligible valley, to the divide separating the waters of the Great Colorado from the Rio Grande, and thence to such point in the San Juan Valley as may be most expedient.

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"7. The Gallisteo Railway.

"Commencing at a point on the said Denver and Rio Grande in New Mexico between Santa Domingo and San Felipe, and extending thence by the most eligible route to the gold mines and anthracite coal fields of the Placer Mountains.

"8. The Santa Rita Railway.

"Commencing at the most eligible point on the said Denver and Rio Grande Railway, in Southern New Mexico, between Fort Craig and El Paso, and extending thence in a general westerly direction to the mines of Pinos Altos and Santa Rita, and to the silver mines of the Burro Mountains. It is intended that the telegraph lines mentioned in the certificate shall be appendant and appurtenant to the said railways, and are to be constructed by the said Denver and Rio Grande Railway Company at their option, on and along any or all of the railway routes above specified or as near thereto as may be expedient. And the termini of the said telegraph lines are to be the same as the termini of the several railways above mentioned, and along which the said telegraph lines, or any of them, may be built. And the said railways and the said telegraph lines are to be built within, or through, and across, and operated in the counties of Arapahoe, Douglas, El Paso, Pueblo, Fremont, Lake, Saguache, Summit, Park, Jefferson, Las Animas, Costillo, Conejos, and Huerfano, of Colorado, and in such counties of New Mexico as the route herein described may pass through.

"3. The capital stock of said company shall be two and one-half million dollars, to be divided into twenty-five thousand shares, at one hundred dollars per share.

"4. The term of the corporate existence of said company shall be fifty years from the filing of this certificate.

"5. The number of the trustees of said company shall be five; And William T. Mellen of New York, R. Henry Lamborn of Philadelphia, Alexander C. Hunt of Denver, William J. Palmer of Colorado, Howard Schuyler of Colorado, are hereby designated as trustees to manage the concerns of said company for the first year of its existence.

"6. That the principal office of said company shall be in the city of Denver, unless legally changed to some other place; and the operations of said company shall be in the several counties and upon the route above mentioned.

"7. The trustees shall have power to make such by-laws as they may deem proper for the management and disposition of the stock and affairs of the company.

"In witness whereof we have hereunto set our hands and seals:

[SEAL.]

WM. J. PALMER.

[SEAL.]

ALEX. C. HUNT.

[SEAL.]

WM. H. GREENWOOD.

"TERRITORY OF COLORADO,

County of Arapahoe, ss:

"I, William H. Townsend, a notary public in and for said county, in the territory aforesaid, do hereby certify that William J. Palmer, Alexander C. Hunt, and William H. Greenwood, who are personally known to me as the parties whose names are subscribed to the foregoing or annexed certificate of incorporation, as parties thereto, and as having executed the same, appeared before me this day in person, and acknowledged that they signed the said instrument of writing for the uses and purposes therein set forth.

"In testimony whereof I have hereunto set my hand and affixed my notarial seal this 27th day of October, A. D. 1870.

[SEAL.]

WILLIAM H. TOWNSEND,

Notary Public.

140 "TERRITORY OF COLORADO,

"Executive Department, ss:

"I, Frank Hall, Secretary of the Territory of Colorado, do hereby certify that the foregoing is a correct transcript of the certificate of incorporation of the Denver and Rio Grande Railway Company which was filed in my office the 27th day of October, A. D. 1870, at 4 o'clock p. m. and recorded in book D, page —.

"In testimony whereof I have hereunto set my hand, and caused the great seal of the Territory to be affixed, this 29th day of October, A. D. 1870.

[SEAL.]

FRANK HALL,

Secretary of Colorado Territory,

Per W. H. TOWNSEND,

Assistant."

3. That the court may take judicial notice of and either party hereto may read in evidence, without further proof of the same, the whole or any part of any act or acts of the Council and House of Representatives of Colorado Territory or of the Legislature of the State of Colorado, incorporating the City of Denver or amending or reducing the same.

4. That on January 1, 1880, said The Denver and Rio Grande Railway Company made, executed and delivered to certain trustees therein named, its certain deed of trust in the nature of a mortgage, bearing date that day, wherein and whereby for a good and sufficient consideration and to secure the payment of certain bonds thereunder issued and the interest thereon, granted, bargained, sold, alienated, transferred, assigned, conveyed and confirmed unto said trustees, their successors, survivors, heirs and assigns forever, all the right, title, interest, claim and demand whatsoever which said Railway Company had or was entitled to in the property described therein, including the line of railway which it had heretofore
141 constructed and operated along said Wynkoop Street, and from Denver southward to Colorado Springs, to Pueblo, etc., together with all the lands, tenements and hereditaments acquired or appropriated for the purpose of a right of way for said Railway line, and all the easements and appurtenances thereunto belonging or in anywise appertaining, and all the railways, ways, rights of ways, depot grounds, tracks and other structures which said company had acquired for or in respect to the locating, constructing, operating, renewing, repairing, replacing and maintaining said railway or any part thereof or convenient or necessary for use for the purposes of said railway, together with all franchises of said company of any and every nature relating thereto, including the rights, powers, privileges and franchises granted to and conferred upon said company under and by virtue of the Acts of Congress in the complaint herein set forth, and together with all and singular the endowments, income and advantages, tenements, hereditaments and appurtenances to said railway belonging or in any wise appertaining. Default having been made in the payment of the interest on the bonds so secured by said mortgage or deed of trust, and having continued for a sufficient length of time to mature by the terms of said instrument the principal and interest of said bonds, foreclosure proceedings were duly had in the Circuit Court of the United States for the District of Colorado, resulting in a decree of foreclosure and sale of all the property of said The Denver and Rio Grande Railway Company subject to said deed of trust of January 1, 1880. Accordingly certain special commissioners under said decree acting and also said trustees acting in execution of the power of sale conferred upon and vested in them under and by virtue of the provisions of said
142 deed of trust of July 15, 1886, duly bargained, granted, sold and conveyed all and singular the property and premises and franchises conveyed by said deed of trust, as did also said The Denver and Rio Grande Railway Company by a separate deed of conveyance, unto The Denver and Rio Grande Railroad Company, a corporation duly organized, for the purpose of purchas-

ing and acquiring the same, under the laws of the State of Colorado on July 14, 1886, and thereupon said last mentioned company went into the possession and control of the railroad track herein involved and continued to operate it until and including June 9, 1908.

5. On June 9, 1908, said The Denver and Rio Grande Railroad Company and The Rio Grande Western Railway Company were duly consolidated under and in accordance with the laws of the States of Colorado and Utah to form the plaintiff herein, and among the lines of railway which were designated in and by the certificate or agreement of consolidation as those which the said consolidated company, the plaintiff herein, intended and proposed to acquire, own, hold, maintain and operate, was the line or track herein involved.

6. This plaintiff thereupon went into the possession and control of the railroad track herein involved, and has operated it continuously since said June 9, 1908.

7. On January 22, 1875, the City Council of the City of Denver passed and approved (Chapter XXIX Revised Ordinances of 1875) an ordinance entitled: "An Ordinance confirming the Rights of Way and other Privileges, heretofore granted to Railroad and other Corporations, in the City of Denver," wherein and whereby it was provided "that all the rights and privileges granted to the respective corporations and persons mentioned in the following ordinances,

heretofore passed by the City Council of the City of Denver, 143 and all the obligations, liabilities and requirements therein provided for, are hereby continued, and confirmed, that is to say:" — among others — "also, an ordinance entitled, 'An ordinance granting the right of way to the Denver and Rio Grande Railway Company, through and across certain streets in the City of Denver.'"

8. That on January 10, 1878, the City Council of the City of Denver passed and approved an ordinance known as No. 1 of 1878, providing "that in addition to the privileges heretofore given to The Denver and Rio Grande Railway Company, with respect to the use of certain streets in said city, the said company is hereby granted" certain other street privileges.

9. That as Chapter XXVIII of the revised ordinances of 1878, the City Council of the City of Denver re-enacted the aforesaid ordinance of January 22, 1875, chapter XXIX revised ordinances 1875.

10. That on January 19, 1886, the City Council of the City of Denver passed and approved an ordinance known as No. 7 of the Series of 1886, granting certain rights of way in the City streets to The Denver and Rio Grande Railway Company, and section 2 thereof provided that:

"Sec. 2. The rights, privileges or franchises declared in or by this ordinance are also expressly declared to be supplementary to an ordinance enacted by the city council of the city of Denver, and approved heretofore, to-wit: on the first day of June, A. D. 1871, reference to which is heretofore made in the next preceding section; and the rights and privileges hereby granted, and the exercise

of the same, are made expressly subject to all and singular the agreements and conditions in said ordinance contained, bearing date of approval as aforesaid, to-wit: June 15, A. D. 1871, so far as the same are or may be applicable thereto."

144 11. That on November 30, 1912, the council of the City and County of Denver passed and approved an ordinance as follows:

"By Authority.

"Ordinance No. 185, Series 1912.

"Aldermanic Bill No. 180, Introduced by Alderman Ford.

"A Bill for an ordinance authorizing and requiring railroad or railway companies maintaining tracks on Wynkoop street, in the city and county of Denver, between the channel of Cherry creek and Nineteenth street, to pave, at their own expense, under the control and supervision of and according to plans and specifications furnished by, and when ordered by, the Board of Public Works of said city and county of Denver, that portion of said Wynkoop street, lying between the rails of each track so maintained by them, and two feet on the outside of each rail thereof, and to keep such pavement in repair thereafter.

"Whereas, It is necessary to the convenience, welfare and security of the City and County of Denver, and the inhabitants thereof, that that portion of Wynkoop Street, in said City and County of Denver extending and running from the channel of Cherry Creek northeasterly to Nineteenth Street, be paved with suitable paving; and,

"Whereas, An improvement district for the paving of said portion of Wynkoop Street is about to be created, in accordance with the provisions therefor in the Charter of said City and County of Denver; and,

"Whereas, Certain railroad or railway companies maintain tracks along and upon portions of said Wynkoop Street, between the channel of said Cherry Creek and said Wynkoop Street for the purpose of running trains, cars and locomotives thereon; now, there-
145 fore,

"Be it enacted by the council of the city and county of Denver:

"Section 1. That when such improvement district is created, all such railroad or railway companies be, and they are hereby, authorized and required, at their own expense, under the control and supervision of, and according to plans and specifications furnished by, and when ordered by the Board of Public Works of said City and County of Denver, to pave that portion of said Wynkoop Street, between the channel of said Cherry Creek and said Nineteenth Street, lying between the rails of each track and maintained by them, and two feet on the outside of each rail thereof, and thereafter cause such pavement to be kept and maintained in good order, condition and repair.

"Section 2. Nothing in this Act contained shall apply to any railway company required specifically by its franchise obligation, license or revocable permit, to pave any portion of said Wynkoop Street, between the channel of said Cherry Creek and said Nineteenth Street, but any such railway company shall do such paving as it is required to do under the terms of such franchise obligation, license or revocable permit.

"JNO. W. FORD,

"President of the Board of Aldermen.

"JNO. B. McGAURAN,

"President of the Board of Supervisors.

"Signed and approved by me this 30th day of November, 1912.

"HENRY J. ARNOLD, *Mayor.*

"Attested by the undersigned with the corporate seal of the City and County of Denver.

"OTTO F. THUM,

"Clerk of the City and County of Denver,

"By C. J. MOORHOUSE, Deputy."

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12. That the plaintiff has now only one track and it and its predecessors in interest have always had only one track within the limits of the intersection of Wynkoop and Seventeenth streets in the City of Denver. This one track was the original main line of The Denver and Rio Grande Railway Company and gave it access to the old depot as in the complaint herein set forth, and its main passenger business was conducted thereover until the time of the construction of the present Union depot in 1881. Since that time that track has been used by The Denver and Rio Grande Railway Company and said The Denver and Rio Grande Railroad Company and this plaintiff continuously in handling carloads of freight and empty freight cars to and from the industries situated on Wynkoop Street between Seventeenth and Nineteenth Streets, in the City of Denver. Among those industries are: the Hendrie and Bolthoff Manufacturing and Supply Company, large dealers in mining and electrical machinery and supplies and hardware; the McPhee and McGinnity Company, large dealers in mill supplies, lumber, sash, doors, blinds, nails, paints and window glass; the Brown Mercantile Company, wholesale grocers and commission merchants; J. D. Best and Company, large dealers in hay, grain, flour, feed and storage; and H. M. Stone's large general merchandising and brokerage business. During those years plaintiff and its predecessors in interest handled and now handles over that track all the freight originating at or destined to those industries where such freight comes into or departs from the city via the Rio Grande or other lines, including the Union Pacific Railroad Company, the Colorado and Southern Railway Company, the Chicago, Burlington and Quincy Railroad Company, the Atchison, Topeka and Santa Fe Railway Company, and the Chicago, Rock Island and Pacific Railway Company. Over a period of several years last past

an average of about 847 carloads of freight per year were
147 handled to and from those industries over that track. Of
that number about 101 cars, or about 12½% are outbound,
and the remainder inbound freight. That freight comes from and
goes to points and places both within and without the State of
Colorado and other States. Of the outbound freight about 94 cars,
or 93%, is shipped to points on plaintiff's lines with which system
this track connects and of which it is part. The outbound freight
is both intrastate and interstate in character as is also the inbound
freight above mentioned. Of the inbound freight about 246 cars,
or one-third, or 33 1/3%, arrives in Denver over the lines of plaintiff,
and the remainder thereof over foreign lines. Plaintiff received
and receives for switching cars to and from these industries from
and to foreign lines twenty cents per ton with a minimum of three
dollars per car. The annual revenues derived by this plaintiff from
foreign lines for that switching service has been between \$1,500
and \$2,000 a year average. That amount plaintiff would lose were
this track to be removed across the intersection of Seventeenth
Street. The Union Pacific Railroad Company has a track on Wyn-
koop Street between Seventeenth and Nineteenth Streets, in Denver,
which it has not used for about twenty years. Should the plain-
tiff's track at the intersection of Wynkoop and Seventeenth Streets
in Denver be removed, it would be necessary that the carloads of
freight handled by the plaintiff into and out of those industries
should be interchanged and transferred between the plaintiff and
the Union Pacific Railroad Company, through and by means of
the tracks at the Union Depot, which tracks are owned and con-
trolled by an independent corporation, to-wit, the Denver Union
Terminal Railway Company, and in that event plaintiff would be
compelled to pay to said Union Pacific Railroad Company, a switch-
ing charge in such sum as might be required by said Union
148 Pacific Railroad Company from setting out and picking
up cars of freight to and from said industries routed over
the lines of the plaintiff, and the loss of revenue resulting therefrom
would be such switching charge as it would have to pay therefor,
and estimated on the present basis of switching charges paid to the
plaintiff, to-wit, twenty cents a ton, or three dollars a car, minimum
on 347 cars a year, inbound and outbound freight handled by the
plaintiff, the loss to plaintiff would aggregate between \$1,000 and
\$1,500. Furthermore, if the tariffs of the plaintiff were changed
by permission of the Interstate Commerce Commission or the Public
Utilities Commission of the State so as to compel the industries so
served to absorb said switching charges, then, in all probability
the result would be that said freights and especially the inbound
freight, would eventually be entirely routed over the lines of the
Union Pacific Railroad Company in order to avoid the absorption
of said switching charge, and, consequently, would result in the
consequent loss of business to the plaintiff. This track joins with
other freight tracks of the plaintiff Company, and thence with the
main lines of the plaintiff company.

13. Said Seventeenth Street, where the same intersects Wynkoop
Street, is one of the main thoroughfares of the City of Denver and

DEPART

608	Colorado Springs, Pueblo, Canon City, Oklahoma, Texas, Chicago, Kansas City, St. Louis, New Mexico and California points, daily.....	3:50 am
4	Colorado Springs, Pueblo, Canon City and Cripple Creek, daily.....	8:00 am
12	Missouri River Flyer for Colorado Springs, Pueblo, Canon City, La Junta, Kansas City, St. Louis, Chicago, Oklahoma, Texas, Leadville, Glenwood Springs, Grand Junction, Salt Lake and Pacific Coast points, daily.....	9:30 am
2	Colorado Springs, Pueblo and Canon City, daily.....	12:15 pm
610	Colorado Springs, Pueblo, Kansas City, Chicago, St. Louis and California Limited, for Arizona and California, daily.....	3:30 pm
429	Colorado Springs, Leadville, Aspen, Glenwood, Grand Junction, Utah and Pacific Coast points, daily.....	6:45 pm
6	Kansas City, Chicago, St. Louis, Texas, Oklahoma, Mexico, California, Arizona points, daily.....	7:45 pm
8	Colorado Springs and Pueblo, daily.....	11:30 pm

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

304	Great Northern-Seattle Special for Fort Morgan, Sterling and Big Horn Basin, Billings, Great Falls, Spokane, Portland, Seattle, daily.....	2:45 am
10	Atlantic Coast Limited for Fort Morgan, Lincoln, Iowa and Illinois points, Chicago and East, daily.....	9:05 am
14	St. Louis Limited, for Fort Morgan, St. Joseph, Kansas City, St. Louis and all Southern and Eastern points, daily.....	2:00 pm
6	Chicago Limited, for Fort Morgan, Lincoln, Omaha, Chicago, St. Paul, Minneapolis, and Nebraska, Tuesday and Illinois Special, for Fort Morgan, St. Joseph, Billings, Butte, Spokane, Sterling, Deadwood, Billings, Butte, daily.....	3:30 pm
302	Northern Pacific-Seattle Special for Fort Morgan, Sterling, Deadwood, Billings, Butte, Spokane, Seattle and Portland, daily.....	7:20 pm
430	St. Louis Express, for Fort Morgan, St. Joseph, Kansas City, St. Louis, East and South, daily.....	9:05 pm
2	Overland express, for Fort Morgan, Lincoln, Chicago and East, daily.....	9:45 pm
187	Sunday Special, for Lafayette, Erie, Longmont and Lyons (Estes Park), Sunday only.....	8:30 am
181	Mountain Special, for Lafayette, Erie, Longmont and Lyons (Estes Park), daily except Sunday.....	9:00 am
183	Mountain Special, for Lafayette, Erie, Longmont and Lyons (Estes Park), daily except Sunday.....	3:00 pm

SANTA FE RAILWAY CO.

7	Pueblo and Colorado Springs, daily.....	7:00 am
13	Colorado Springs, Glenwood, Aspen, Leadville, Utah, Nevada, Montana, Idaho, Oregon, Washington and California, daily.....	8:50 am
5	Pueblo, Colorado Springs, Chicago, Kansas City, St. Louis, Texas, Pacific Coast, Mexico, Arizona, New Mexico, daily.....	10:00 am
607	Chicago, Kansas City, Pueblo, Colorado Springs and California Limited, from California and Arizona, daily.....	2:15 pm
1	Canon City, Pueblo and Colorado Springs Express, daily.....	3:20 pm
11	Colorado Flyer from Chicago, St. Louis, Oklahoma, Texas, Canon City, Pueblo and Colorado Springs, daily.....	5:30 pm
601	Arkansas Valley Local, from Canon City, Pueblo and Colorado Springs Local, daily.....	6:45 pm
438	Pueblo, Colorado Springs and Cripple Creek Express, daily.....	8:20 pm

Exhibit "C."

3	Overland Express from Chicago, Omaha, Lincoln and Fort Morgan, daily.....	7:30 am
15	St. Louis Express from St. Louis, Kansas City, St. Joseph and Fort Morgan, daily.....	7:50 am
301	Northern Pacific-Seattle Special from Portland, Seattle, Spokane, Butte, Billings, Deadwood, Sterling and Fort Morgan, daily.....	9:25 am
9	Atlantic Coast Limited from New York, Chicago, Omaha, Lincoln and Fort Morgan, daily.....	1:15 pm
13	Colorado Limited from St. Louis, Kansas City, St. Joseph and Fort Morgan, daily.....	2:30 pm
440	Denver Limited from Chicago, Lincoln and Fort Morgan, daily.....	8:30 pm
303	Great Northern-Seattle Special from Portland, Seattle, Spokane, Great Falls, Billings, Sterling and Fort Morgan, daily.....	10:30 pm
182	Mountain Special, from Lyons (Estes Park), Longmont, Erie and Lafayette, daily except Sunday.....	8:30 am
184	Mountain Special, from Lyons (Estes Park), Longmont, Erie and Lafayette, daily except Sunday.....	1:30 pm
188	Sunday Special, from Lyons (Estes Park), Longmont, Erie and Lafayette, Sunday only.....	7:30 pm

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.

8	"Rocky Mountain Limited," for Lincoln, Omaha, Des Moines, Chicago and the East, St. Joseph, Topeka and the South-east	9:00 am	7:35 am
★ 40	"Colorado Flyer," for Kansas City, St. Joseph, Atchison, St. Louis and the East	1:50 pm	
6	"Eastern Express," for Lincoln, Omaha, Des Moines, Chicago and the East, Topeka, St. Joseph, Kansas City, St. Louis and the Southeast	9:00 pm	11:45 am
7	"Rocky Mountain Limited," from Chicago, Des Moines, Omaha, Lincoln and the East	1:35 pm	

COLORADO & SOUTHERN RAILWAY CO.

608	Colorado Springs and Pueblo Passenger, daily	3:50 am	
40	Passenger, for Elizabeth, Elbert, Eastonville and Falcon, daily	7:30 am	
★ 431	The Flyer, for Colorado Springs, Cripple Creek and Pueblo, daily	8:00 am	
12	Pacific Express, for Colorado Springs, Pueblo, Utah, Nevada, Idaho, Montana, Washington, Leadville, Glenwood Springs, Grand Junction, Oregon and California, daily	9:30 am	
2	Texas Fast Mail, for Colorado Springs, Pueblo, Walsenburg, Trinidad, Fort Worth, El Paso, Dallas, Houston, San Antonio, Galveston, New Orleans, Oklahoma points and Memphis, daily	12:15 pm	
16	Accommodation, for Eastonville, Elbert and Colorado Springs, Sunday	2:00 pm	
610	Colorado Springs and Pueblo Passenger, daily	3:30 pm	
38	Accommodation, for Elizabeth, Elbert and Falconville, Sunday only	6:10 pm	
16	California Express, for Colorado Springs, Leadville, Aspen, Glenwood, Grand Junction, Utah, California, Nevada, Idaho, Montana, Oregon and Washington points, daily	6:45 pm	
8	Colorado Springs and Pueblo Passenger, daily	7:45 pm	
8	Texas Fast Mail, for Colorado Springs, Pueblo, Walsenburg, Trinidad, Ft. Worth, El Paso, Dallas, Houston, San Antonio, Galveston, New Orleans, Oklahoma points and Memphis, daily	11:30 pm	

CLEAR CREEK DISTRICT.

★ 432	Golden, Idaho Springs, Georgetown, Silver Plume, Black Hawk, Central City Mail and Express, daily	8:10 am	9:45 am
55	Excursion train for Golden, Idaho Springs, Georgetown, Silver Plume and the summit of Mt. McClellan, Sunday		
53	Golden, Idaho Springs, Georgetown, Silver Plume, Black Hawk and Central City Express, daily except Sunday	9:00 am	5:30 pm
59	Sunday only, Golden, Black Hawk, Central City, Idaho Springs, Georgetown and Silver Plume	3:20 pm	
35	Louisville, Boulder and Eldora Mail and Express, daily	6:20 pm	7:00 pm

NORTHERN DISTRICT.

★ 433	Boulder, Louisville, Eldora, Lafayette, Longmont, Loveland, Fort Collins and Greeley Mail and Express, daily	9:05 am	2:30 pm
23	Fort Collins Special, for Boulder, Longmont, Loveland and Fort Collins, daily	8:20 am	7:00 pm
70	Mail and Express, for Grant, Canon, Eldora and Fairplay, Tuesdays, Thursdays and Saturdays only; Platte Canon Resorts, Sundays to Grant only; other days through to Leadville	8:15 am	
74	Saturday only, Platte Canon Fishermen's Train for Pine Grove, Bailey's, Shawnee and Grant	2:06 pm	
72	Platte Canon Resorts, Pine Grove, Bailey's, Shawnee and Grant, daily except Sunday	5:15 pm	

PLATE CANON AND LEADVILLE DISTRICTS.

60	Mail and Express, for Grant, Canon, Eldora and Fairplay, Tuesdays, Thursdays and Saturdays only; Platte Canon Resorts, Sundays to Grant only; other days through to Leadville	8:15 am	
74	Saturday only, Platte Canon Fishermen's Train for Pine Grove, Bailey's, Shawnee and Grant	2:06 pm	
72	Platte Canon Resorts, Pine Grove, Bailey's, Shawnee and Grant, daily except Sunday	5:15 pm	
60	Valverde, Overland, Ft. Logan and Mt. Morrison, daily	8:25 am	
62	Valverde, Overland, Ft. Logan and Mt. Morrison, daily	9:30 am	
64	Valverde, Overland, Sheridan, Ft. Logan and Mt. Morrison, daily	10:45 am	
★ 434	Valverde, Overland, Sheridan, Ft. Logan and Mt. Morrison, daily	1:15 pm	
68	Mt. Morrison, daily except Sunday	5:00 pm	

TRAINS

61	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily except Sunday	8:20 am	
63	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily	10:30 am	
65	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily	12:50 pm	
★ 444	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily	4:45 pm	
69	Mt. Morrison, Ft. Logan, Sheridan, Overland and Valverde, daily	7:10 pm	

DENVER & RIO GRANDE RAILROAD CO.

1	Pacific Coast Limited, for Castle Rock, Palmer Lake, Colorado Springs, Manitou, Pueblo, Florence, Canon City, (Moffat and Alamosa daily except Sunday), Buena Vista, Leadville, Glenwood, Grand Junction, Utah, Nevada, Idaho, Washington, Oregon and California, daily	8:00 am	
5	Chicago-San Francisco Express, for Castle Rock, Palmer Lake, Colorado Springs, Pueblo, Florence, Canon City (Westcliffe, daily except Sunday), Salida, Leadville, Glenwood, Grand Junction, Utah, Nevada, and California, daily	9:00 am	
11	Eastern Limited, for Colorado Springs, Pueblo, Wichita, Kansas City and St. Louis, daily	12:03 pm	
9	Eastern Express, for Castle Rock, Palmer Lake, Colorado Springs, Cripple Creek and Victor (via Colorado Springs), Pueblo, Canon City, Kansas City and St. Louis, daily	3:40 pm	
★ 435	Pacific Coast Mail, for Colorado Springs, Lake, Colorado Springs, Manitou, Pueblo, Florence, Canon City, (Moffat and Alamosa daily except Sunday), Buena Vista, Leadville, Glenwood, Grand Junction, Utah, Nevada, Idaho, Washington, Oregon and California, daily	8:00 am	
1	Pacific Coast Limited, for Castle Rock, Palmer Lake, Colorado Springs, Manitou, Pueblo, Florence, Canon City, (Moffat and Alamosa daily except Sunday), Buena Vista, Leadville, Glenwood, Grand Junction, Utah, Nevada, Idaho, Washington, Oregon and California, daily	8:00 am	
5	Chicago-San Francisco Express, for Castle Rock, Palmer Lake, Colorado Springs, Pueblo, Florence, Canon City (Westcliffe, daily except Sunday), Salida, Leadville, Glenwood, Grand Junction, Utah, Nevada, and California, daily	9:00 am	
11	Eastern Limited, for Colorado Springs, Pueblo, Wichita, Kansas City and St. Louis, daily	12:03 pm	
9	Eastern Express, for Castle Rock, Palmer Lake, Colorado Springs, Cripple Creek and Victor (via Colorado Springs), Pueblo, Canon City, Kansas City and St. Louis, daily	3:40 pm	
★ 435	Pacific Coast Mail, for Colorado Springs, Lake, Colorado Springs, Manitou, Pueblo, Florence, Canon City, (Moffat and Alamosa daily except Sunday), Buena Vista, Leadville, Glenwood, Grand Junction, Utah, Nevada, Idaho, Washington, Oregon and California, daily	8:00 am	

80 Valverde, Overland, Sherman, Ft. Logan and 5:00 pm and Valverde, daily 7:10 pm

DENVER & RIO GRANDE RAILROAD CO.

1	Pacific Coast Limited, for Castle Rock, Palmer Lake, Colorado Springs, Manitou, Pueblo, Florence, Canon City, Salida, Alamosa, Leadville, daily except Sunday	5:00 pm	16	Colorado-New Mexico Express, from Rico, Telluride, Ouray, Grand Junction, via Narrow Gauge, Montrose, Gunnison, Silverton, Leadville, Salida, Canon City, to Colorado Springs, daily except Monday	7:40 am
5	Chicago-San Francisco Express for Castle Rock, Palmer Lake, Colorado Springs, Pueblo, Florence, Canon City, (Westcliffe, daily except Sunday), Leadville, Glenwood, Grand Junction, Utah, Nevada, and California, daily	9:00 am	12	Denver Express, from St. Louis, Kansas City, Pueblo, Manitou, Colorado Springs, Palmer Lake and Castle Rock, daily	12:05 pm
11	Eastern Limited for Colorado Springs, Pueblo, Wichita, Kansas City and St. Louis, daily	12:05 pm	6	San Francisco-Chicago Express from Los Angeles, San Francisco, California, Nevada, Utah, Grand Junction, Glenwood, Aspen, Leadville, Salida, Pueblo and Colorado Springs, (Cripple Creek connections), daily	1:35 pm
9	Eastern Express, for Castle Rock, Palmer Lake, Colorado Springs, Cripple Creek and Victor, (via Canon City and St. Louis, daily	3:40 pm	14	St. Louis, Pueblo and Denver Express, from St. Louis, Kansas City, Pueblo, Manitou, Colorado Springs and Palmer Lake, daily	4:15 pm
435	Victor, (via Canon City and St. Louis, daily	3:40 pm	445	Colorado Springs and Palmer Lake, daily	4:15 pm
3	Pacific Coast Mail for Colorado Springs, Pueblo, Florence, Canon City, Salida, Leadville, Glenwood, Aspen, Grand Junction, Utah, Montana, Oregon, Washington, California, Idaho, Nevada, and California, daily	5:45 pm	4	Atlantic Coast Mail, from California, Oregon, Washington, Utah, Grand Junction, Leadville, Glenwood, Salida, Pueblo, Colorado Springs, daily	6:20 pm
13	Pueblo and Santa Juan Express, for Walsen, Pagosa, Durango, Silverton, daily	7:35 pm	2	Atlantic Coast Limited, from California, Nevada, Idaho, Oregon, Washington, Montana, Utah, Grand Junction, Glenwood, Leadville, (Nofat and Alamosa, daily except Sunday), (Westcliffe, daily except Sunday), Canon City, Silverton, Trinidad, Pueblo, Manitou and Colorado Springs, daily	8:15 pm
15	Colorado Express, for Colorado Springs, Pueblo, Florence, Canon City, Salida, Leadville, Gunnison, Montrose, Grand Junction, via Narrow Gauge, Ouray, Telluride and Rico, daily	9:00 pm	10	Canon City, Florence, Pueblo, Colorado Springs and Palmer Lake Passenger, daily	10:45 pm
21	Overland Park, Petersburg, Littleton and Fort Logan, daily except Sunday	6:55 am	22	Fort Logan, Littleton, Petersburg and Overland Park, daily except Sunday	8:10 am
436	Overland Park, Petersburg, Littleton and Fort Logan, daily	9:05 am	446	Littleton, Fort Logan, Petersburg and Overland Park, daily	10:20 am
25	Overland Park, Petersburg, Fort Logan and Littleton, daily	12:30 pm	26	Fort Logan, Littleton, Petersburg and Overland Park, daily	1:45 pm
27	Overland Park, Petersburg, Fort Logan and Littleton, daily	3:20 pm	28	Fort Logan, Littleton, Petersburg and Overland Park, daily	4:30 pm
29	Overland Park, Petersburg, Fort Logan and Littleton, daily, (except Saturday and Sunday 6:00 p m)	5:20 pm	30	Fort Logan, Littleton, Petersburg and Overland Park, daily	6:25 pm

SUBURBAN TRAINS.

UNION PACIFIC RAILROAD CO.

120	"Kansas City Limited," for Limon, Hugo, Oakley, Ellis, Salina, Topeka, Lawrence, Leavenworth, Kansas City, East and South, daily	10:00 am	103	"California Mail," from Kansas City, St. Louis-Chicago Express from Lawrence, Leavenworth, Topeka, Missouri, and Kansas points, daily	6:40 am
★102	"St. Louis-Chicago Limited," for Limon, Oakley, Salina, Topeka, Lawrence, East and South, Kansas City, St. Louis, Leavenworth, Topeka, Lawrence, East and South, daily	1:40 pm	★119	"Denver Limited," Local, Kansas City and East, Lawrence, Leavenworth, Topeka, Salina and Kansas points, daily	11:35 am
437	"California Mail," for Limon, Hugo, Oakley, Ellis, Salina, Kansas City, Topeka, Lawrence, Leavenworth, Pershing, Chicago, St. Louis, Halstead, East and South, daily	8:40 pm	447	East Lawrence, Leavenworth, Topeka, Salina and Kansas points, daily	11:35 am
103	"California Mail," for Brighton, Erie, Boulder, La Salle, Evans, Greeley, Eaton, Ault, Cheyenne, Ogden, Salt Lake, San Francisco, Los Angeles, daily	7:20 am	★101	"St. Louis-Chicago Limited," from St. Louis, Kansas City and East, Lawrence, Leavenworth, Topeka, Oakley and Limon, daily	3:30 pm
★119	"Pacific Limited," for Greeley, Cheyenne, Ogden, Salt Lake, San Francisco, Los Angeles, Fort Collins, Butte, Boise, Spokane, Portland, Seattle, daily	12:25 pm	NORTHERN DISTRICT		
101	"Overland Limited," Greeley, Cheyenne, Ogden, Salt Lake, San Francisco, daily	4:40 pm	120	"California Mail," from San Francisco, Los Angeles, Seattle, Portland, Spokane, Boise, Butte, Postello, Ogden, Salt Lake, Cheyenne, Greeley, La Salle, Brighton, Boulder, Erie, daily	9:30 am
109	"Los Angeles, Oregon-Washington Limited," for Brighton, La Salle, Greeley, Cheyenne, Ogden, Salt Lake, San Francisco, Los Angeles, Butte, Boise, Spokane, Portland, Seattle, daily	7:05 pm	102	"Overland Limited," from San Francisco, Los Angeles, Seattle, Portland, Spokane, Boise, Butte, Postello, Ogden, Salt Lake, Cheyenne, Greeley, daily	11:15 am
438	Local, for Eastlake, St. Vrain, Erie, Boulder, Dacono, Dent, Milliken, Fort Collins, daily	8:00 am	104	"California Express," from San Francisco, Los Angeles, Ogden, Salt Lake, Wyoming points, Cheyenne, Greeley, La Salle, Brighton, Boulder, Erie, daily	6:05 pm
163	Local, for Eastlake, St. Vrain, Dacono, Dent, Milliken, Fort Collins, daily	6:55 pm	104	Local from Cheyenne, Pierce, Ault, Eaton, Greeley, La Salle, Platteville, Lupton, Brighton, daily	7:30 pm
14	"Denver Special," for Fort Morgan, Merino, Alameda, Sterling, Iliff, Crook, Sedgwick, Ovid and Julesburg, daily	10:30 am	448	Local, from Fort Collins, Milliken, Dent, La Salle, Dacono, St. Vrain, Eastlake, Boulder, Erie, daily	9:45 am
12	"Colorado Special," for Kersey, Fort Morgan, Marysville, Sterling, Iliff, Crook, Sedgwick, Omaha, Chicago, Nebraska, Iowa, Illinois and all points East-daily	3:30 pm	162	Local, from Fort Collins, Milliken, Dent, Briggsdale, La Salle, Dacono, Eastlake, Boulder, Erie, daily	5:30 pm
16	"Chicago Express," for Kersey, Fort Morgan, Union, Merino, Sterling, Iliff, Crook, Red Lion, Sedgwick, Omaha, Chicago, St. Paul and East, daily	10:00 pm	JULESBURG DISTRICT		

"Trains of the above railroads usually maintain their schedule time, but neither the said roads nor the Denver Union Terminal Railway Company guarantees that they maintain this schedule."

leads directly to the Union Passenger depot in said City, said depot being owned and controlled by said The Denver Union Terminal Railway Company; said depot is the terminal of the lines of railroad mentioned on the printed schedule, "Exhibit A," hereto annexed and hereby made part hereof, and said "Exhibit A" shows the passenger trains scheduled to arrive at and depart from said Union depot daily. Said crossing at Seventeenth and Wynkoop Streets is used by persons going to and coming from said Union depot, and the trains arriving at and departing therefrom, and by vehicles for the transportation of passengers and their baggage going to
 149 and from said depot, and the average number of persons so using said crossing in their passage to and from said Union depot daily is approximately between fifteen hundred and twenty-five hundred persons, and the switching of railroad cars by the plaintiff over said track at said intersection of said streets produces that inconvenience which unavoidably follows the delay thereby of passengers and vehicles thereat.

14. The ordinances of the City of Denver authorize the Mayor and Council of said City to require of steam railroad companies operating within the corporate limits of said City the placing of flagmen, gates, automatic crossing bells, or other safety appliances at such places and street crossings within the said City as *and* may be designated by said Mayor and Council, and that the same shall be maintained and operated by competent attendants in charge thereof during such time or hours as shall be designated by said Mayor and Council, and accordingly the ordinances of said City of Denver designate certain places where said flagmen, gates, automatic crossing bells and other safety appliances must and shall be maintained, but no such requirement has been or is made by the Mayor or Council of said City of Denver with respect to said crossing at the intersection of said Wynkoop and Seventeenth Streets.

15. That on Sundays, Festival days and Convention days the traffic across said Wynkoop Street on Seventeenth Street reaches in numbers a considerable excess over the twenty-five hundred heretofore stated.

16. That since 1881, this track has not been used as the main line of railroad but as a switching track for reaching said industries and setting out thereto and picking up therefrom inbound and outbound freight, interstate and intrastate in character.

150 Dated this 26th day of August, 1914.

(Signed)

E. N. CLARK,
 R. G. LUCAS,

Attorneys for Plaintiff.

(Signed)

I. N. STEVENS,
 GEO. Q. RICHMOND,
 JACOB J. LIEBERMAN,
Attorneys for Defendants."

(Here follows schedule showing the arrival and departure of trains, marked p. 151.)

152 Mr. Lucas: We desire also, in view of the possibility that the Supreme Court of the United States might possibly say that it did not take judicial notice of the charter of the city of Denver, out of abundance of precaution we desire to offer a few of the provisions of those charters, to make the record.

Mr. Richmond: Are they stipulated?

Mr. Lucas: It is stipulated that we can offer any portion of any charter.

I desire to read in evidence that portion of an act of the House of Representatives of the Territory of Colorado, approved the 9th day of February, 1866, entitled "An Act to Revise the Law Incorporating the City of Denver and the Several Acts Amendatory thereof into one Act, and to Amend the same."

We desire to offer in evidence Section 4 of Article I of that Act, reading as follows:

"The inhabitants of the said City, by the name and style aforesaid, through and by the said City Council shall have power and authority to purchase, hold, possess and enjoy both real and personal property or a city hall, jail, public grounds and for other public purposes, and shall have power and authority to sell and convey the same, and may also, for the use of the inhabitants of said City, purchase, hold, possess and enjoy real property beyond the limits of said City for burying grounds and cemeteries, and improve the same."

We also offer in evidence Section 5 of Article I of that Act providing:

"That the inhabitants of said City, by the name and style aforesaid shall have power and authority, and they are hereby empowered and authorized, to take, hold, possess, use and enjoy both real and personal property by deed, grant, gift, bequest, devise, or otherwise, and they shall have the power, through and by the City
153 Council, to sell and convey the same for the sole use and benefit of the inhabitants of said City."

We also offer in evidence Sections 9, 16, 41 and 43 of Article V of that Act, providing:

"That the City Council of said City of Denver shall have power, under Section 9 of Article V, to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve and keep in repair streets, avenues, lanes and alleys, sidewalks, drains and sewers."

Also, the City Council is empowered, by Section 16 of the Article, to provide for enclosing, improving and regulating all public grounds belonging to the City.

Section 41 of that article, empowering the City Council to remove all obstructions from the streets, lanes, avenues and alleys of the City and from the sidewalks and curbstones within the City; also section 43 of that Article empowering the City Council to prevent and remove all encroachments into or upon all or any streets, lanes, avenues or alleys within the City, established by law or ordinance.

And also section 46 of that Article, providing that the City Council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this

Act, so that such ordinances be not repugnant to or inconsistent with the Constitution of the United States or the organic act of this Territory.

Mr. Richmond: To that offer of evidence under the stipulation we have a right to make the objection that it is incompetent, irrelevant and immaterial—and we put that objection in—as not pertinent to the issues presented by the pleadings in this case.

The Court: I will overrule the objection—just to make
154 the record—and consider your request and briefs with reference to it.

Mr. Richmond: We save an exception.

Mr. Lucas: We also offer in evidence Section 47 of Article VI of the charter of the City of Denver, approved February 13, 1874, by an act passed by the Council and House of Representatives of the Territory of Colorado, and entitled "An Act to Amend an Act entitled 'An Act to Reduce the Law Incorporating the City of Denver and the Several Acts Amendatory thereof into one Act, and to Amend the Same.'"

Section 47 of said Article VI of said Act empowering the City Council of the City of Denver to regulate and prohibit the use of locomotive engines and require railroad cars to be propelled by other power than that of steam, to direct and control the location of railroad tracks and to require railroad companies to construct, at their own expense, such bridges, tunnels or other conveniences at public railroad crossings as the City Council may deem necessary, and to regulate the rates of speed of all railroad trains.

Mr. Richmond: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Richmond: We save an exception.

Mr. Lucas: We also offer in evidence subdivision 45th of Section XL of the charter of the City of Denver, approved April 6, 1877, an act of the General Assembly of the State of Colorado entitled "An Act to Reduce the Law Incorporating the City of Denver and the Several Acts Amendatory thereof into one Act and to Revise and Amend the Same," said section 40 of said Act providing that the
155 "City Council shall have, subject to the provisions hereinafter named, the general management and control of the finances and of all property, real, personal and mixed, belonging to the corporation, and shall likewise have power within the jurisdiction of the City by ordinance not repugnant to the Constitution of the United States or the Constitution of the State of Colorado," to do certain things enumerated in that section.

The 45th subdivision provides that the Council shall have such power to regulate and prohibit the use of locomotive engines and to require railroad cars to be propelled by other power than that of steam, to direct and control the location of railroad tracks, and to require railroad companies to construct, at their own expense, such bridges, tunnels, or other conveniences at public railroad crossings as the City Council may deem necessary and to regulate the rules of speed of all railroad trains within the City limits."

I apprehend that that word "rules" is a misprint and should be rates.

Mr. Richmond: The same objection to that.

The Court: Overruled.

Mr. Richmond: We save an exception.

Mr. Lucas: That is the case for the plaintiff, all we care to introduce.

The plaintiff rested.

Mr. Richmond: I suppose your Honor wants to hear the argument on the law of the case, there being no further testimony by either side.

The Court: Yes sir.

Mr. Richmond: We are perfectly willing to submit it on briefs.

Mr. Clark: Has the other side no testimony to introduce?

Mr. Richmond: No.

156 The Court: I believe, from my short experience on the bench, that oral argument is of very great assistance to the judge.

Mr. Clark: We would much prefer, if your Honor please to submit oral argument in the case.

The Court: I would very much prefer to hear oral argument supplemented by briefs, because I notice in the oral argument you will emphasize and explain the various points, and I think it aids the court very greatly to have oral argument.

Mr. Lucas: We are ready.

The Court: I would like very much to hear you.

(Thereupon the case was argued to the Court by Counsel for the respective parties.)

The above and foregoing, together with the Exhibits herein referred to and made a part hereof, is all the testimony offered and introduced upon the part of the respective parties hereto.

157 On the 22nd day of October, 1914, the court announced the following conclusions of law, to-wit:

The Court: Pressure of court business has prevented me from preparing a formal opinion in this case. I will, therefore, content myself with stating my conclusions of law.

1. The so-called "Charter" of the plaintiff's predecessor was merely a certificate of incorporation under the general laws of the Territory of Colorado. It did not purport to be, and could not be, a grant by the legislature of a right of way along or across the streets of Denver.

2. Without legislative authority, the City could not grant a right of way to a steam railroad along or across the streets of the City.

3. In 1871, when the City of Denver passed the ordinance purporting to grant to the plaintiff's predecessor a right of way along Wynkoop street at its intersection with 17th street, the legislature had not conferred, or attempted to confer, upon the City the power to grant such right of way.

4. It is unnecessary, therefore, to decide whether the Act of Congress of 1867 prohibited the City of Denver from granting such right of way, nor is it necessary to consider whether that Act of Congress prohibited the Territorial legislature from granting such right of way, or delegating to the City the power to grant the same.

5. The privileges attempted to be conferred by the Ordinance of 1871 were not validated by the acts of congress of 1873, 1875 and 1877.

6. The ordinance of 1871 was void.

7. If the act of congress of 1867 prohibited the legislature from granting the right of way, either directly or by delegating the power to the City of Denver, that act ceased to operate when Colorado was admitted into the Union as a state.

8. After Colorado became a state, the charter of the City of Denver was amended so as to confer upon the city the power to grant to steam railroads rights of way along and across the streets of the city, and the city thereafter passed ordinances recognizing the right of plaintiff, and its predecessors, to occupy Wynkoop street at its intersection with 17th street.

9. While it is the law that estoppel cannot confer a right that the city has no power to grant, and therefore that no act or acquiescence on the part of the city while it was without power to grant a right of way could estop the city, still, by the passage of the ordinances referred to in the eighth paragraph hereof, and by all the facts and circumstances occurring after the city had become vested with the power to grant such right of way, the city should be, and is, estopped to deny plaintiff's right to retain its track on Wynkoop street at its intersection with Seventeenth street at the present time.

10. In 1875 an ordinance was passed confirming the right of way and other privileges theretofore granted to the plaintiff's predecessor, and continuing said rights of way and privileges. That was before Colorado became a state, and while the city of Denver had no power to grant such right of way, and this ordinance cannot be considered as in itself creating an estoppel, nor can facts and circumstances occurring while Denver had no power to grant such right of way be considered as in themselves creating an estoppel; but such ordinance and such facts and circumstances may, nevertheless, be considered as tending to explain the ordinance passed, and the facts and circumstances occurring after the city of Denver became vested with such power.

11. The city, under the police power, has the right to make and enforce reasonable regulations with reference to the hours during which cars may be run over the plaintiff's track at the point in controversy so as to fully protect the public against danger and unnecessary inconvenience, but the city has no right at the present time to remove said track or cause its removal. Whether the city will have the right to remove the track, or cause its removal, when the "charter" of the plaintiff's predecessor expires in 1920, it is not necessary, nor is it proper, at this time to determine.

The defendants will be enjoined from removing plaintiff's track in Wynkoop street at its intersection with Seventeenth street.

160 Exceptions will be reserved for the plaintiff.

Mr. Lucas: If your Honor please, I think in view of the possible future course of this litigation, it might be desirable if special findings of fact and conclusions of law were submitted to your Honor. I would suggest fifteen days.

The Court: I presume this is merely preliminary to a final decision by the Supreme Court of this State, and possibly by the Supreme Court of the United States.

Mr. Lucas: Yes, and I thought, in view of a possible appeal to the higher court, they would require this.

The Court: Yes. Of course it would be very easy to do that, because all the facts are practically stipulated.

Mr. Richmond: Then no judgment will be entered.

The Court: No judgment will be entered until I make these findings. The findings are in favor of the defendants. I will suspend any entry of judgment or decree until the matter can be put in proper shape. You may submit formal findings of fact within the next fifteen days.

161 Thereafter, on the 13th day of November, 1914, the following proceedings were had:

Mr. Lucas: If your Honor please, Mr. Lieberman and myself have talked over some of the findings in this case, and while I do not think there are many objections, certainly not very many serious objections, Mr. Lieberman wishes to call your Honor's attention to certain matters.

Mr. Lieberman: I might say now that it would be naturally understood that we are not agreeing to any of these findings, or stipulating or consenting to any of them, but this is just a matter of assisting the Court by pointing out certain portions of the findings that we want to make a record objection to.

The first matter I wish to call attention to is on page 22, in Finding of Fact No. 11, beginning in the second line of page 22, "Among the industries so built up as aforesaid and so served by this plaintiff and its predecessors in interest, as aforesaid, are prominent and important lumber industries, mercantile interests, machinery interests," and so on.

The Court: Isn't that in your stipulation of facts?

Mr. Lucas: The difference is this: The stipulation of facts says that among the industries built up were certain named industries, and they characterize them as large instead of important.

Mr. Lieberman: My objection is that it is immaterial in this matter, and that the only connection in which it was used in the stipulation of facts was in describing the owners of property adjoining the street and that it is merely descriptive of the owners.

The Court: We will let that finding remain, because we had oral evidence in reference to that.

162 Mr. Lieberman: If the record will simply show that we made objection to, on the ground that it is immaterial and irrelevant, beginning with the word "among" in the second line of

page 22, and ending with the words "public at large" in the ninth line of page 22, and that the objection was overruled and an exception saved.

The Court: Yes, that may be done.

Mr. Lieberman: On page 23, in the second line, there is this language: "Among those industries are: The Hendrie and Bolthoff Manufacturing and Supply Company, large dealers in mining and electrical machinery and supplies and hardware"——

Mr. Lucas: That word "large" is in the stipulation.

Mr. Lieberman: I know, but it is purely irrelevant and immaterial, and has no connection with or bearing upon the issues in this case.

The Court: We will leave that in. I will overrule your objection to that.

Mr. Lieberman: Save an exception.

The Court: You do not object to the language, but the basis of your objection is that the whole thing is irrelevant.

Mr. Lieberman: Yes.

The Court: Very well, the objection on that ground will be overruled, and an exception reserved.

Mr. Lieberman: I object to Finding of Fact No. 15, on the ground that the same is immaterial.

The Court: Objection overruled.

Mr. Lieberman: Save an exception.

As to Findings of Fact numbered 18, 19, 20, 21 and 22, our objection is that they do not constitute findings of fact.

The Court: Objection overruled.

Mr. Lieberman: Save an exception.

163 The defendants object to the conclusions of law, and each thereof, for the reason that the same are not justified by the evidence.

On the tenth day of December, 1914, on motion of the plaintiff, the Court signed its decree herein.

Mr. Lieberman: At this time the defendants will save an exception to the entry of the decree and to the entry of the judgment and to each and all of the findings of fact and conclusions of law, and we will ask for five days in which to file a motion for a new trial.

The Court: Five days will be allowed to file a motion for a new trial or to take such other steps as you may be advised.

Thereafter, on the 15th day of December, 1914, the defendants herein filed their motion for a new trial, and the Court, being sufficiently advised in the premises, denied said motion.

To which ruling of the Court the defendants, and each of them, by their counsel, then and there duly excepted.

164 Filed in District Court, City and County of Denver, Colo.,
Feb. 9, 1915. J. Sherman Brown, Clerk.

Filed in the Supreme Court of the State of Colorado Feb. 17, 1915.
James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant in Error.

Error from the District Court of the Second Judicial District of the
State of Colorado within and for the City and County of Denver.

Assignment of Errors.

Come now the plaintiffs in error, by their attorneys, I. N. Stevens, Geo. Q. Richmond and Jacob J. Lieberman, and respectfully show unto this Honorable Court that in the record and in the proceedings in the Court below in this cause, No. 57865, in the District Court of the Second Judicial District within and for the City and County of Denver, State of Colorado; and in and by the findings, judgment, decree and order of said Court herein made, rendered and entered there are manifest errors in this, to-wit:

165

I.

The Court erred in its findings of fact, in this:

a. In finding, as a part of findings of fact No. 6, that The Denver and Rio Grande Railway Company duly accepted the provisions of Ordinance No. 9 of the Series of 1871.

b. In making the following finding of fact originally numbered 12 but changed by the Court to No. 11.

"Among the industries so built up, as aforesaid, and so served by this plaintiff and its predecessors in interest, as aforesaid, are prominent and important lumber industries, mercantile interests, machinery interests, mining and milling supply company interests, and

other interest, *machinery interests, mining and milling supply company interests, and other interests*, all of vast public importance to the commercial and financial interests of the defendant City, and the public at large."

c. In using the descriptive term "large" in finding of fact originally numbered 13, but changed by the Court to 12, in describing the various industries bordering and adjoining Wazee Street, on which the track in question lies.

d. In making findings of fact originally numbered 16, but changed by the Court to No. 15.

e. In making and entering findings of fact originally numbered 19 to 23 inclusive, but changed by the court to 18 to 22 inclusive, and treating same as findings of fact.

II.

The Court erred in its findings and conclusions of law in this, to-wit:

a. In holding that the plaintiff has the lawful right to occupy Wynkoop Street at its intersection with Seventeenth Street with its said track.

b. In holding that ordinance No. 34 of the Series of 1914 166 is invalid, illegal, unlawful and void.

c. In holding that a writ of injunction should be issued.

d. In issuing said writ of injunction.

e. In taxing or assessing the costs of the action to the defendant.

III.

The Court erred in entering judgment against the plaintiffs in error and entering the decree upon such judgment.

IV.

The order of the Court in entering the injunction is contrary to the law applicable to such cases, on the grounds and for the reasons set forth in the brief herein to be filed.

V.

The judgment of the Court is contrary to the facts involved in this case and the law relating thereto.

Wherefore, plaintiffs in Error pray this Honorable Court that the proceedings of the Court below be reviewed, and that its findings, conclusions, judgment, order and decree therein be reversed, and that the case be remanded for such other and further proceedings as to this Court may seem proper.

I. N. STEVENS,
GEO. Q. RICHMOND,
JACOB J. LIEBERMAN,
Attorneys for Plaintiffs in Error.

167 Forasmuch as the above and foregoing contains all the evidence offered and introduced on the trial of this cause for and on behalf of the parties hereto respectively, and all proceedings had and objections and motions made and interposed during the trial of this cause, the rulings, orders, findings and judgment of the court, the exceptions taken and reserved herein by the respective parties hereto, and inasmuch as the same do not fully appear of record, the defendant respectfully tenders this its bill of exceptions or record on error, and prays that the trial judge may approve, allow, settle, sign and seal the same, pursuant to the statute and rules in such case made and provided; and which, when so approved, allowed, settled, signed and sealed, may become part of the record herein.

And I, the undersigned, Judge of said Court, who presided at the trial of said cause, do hereby approve, allow, settle, sign and seal the same as the record on error or bill of exceptions in said cause, and do certify that the same is full, true, complete and correct, and contains all of the evidence introduced or offered on the trial of said cause, and I do further certify that I have fully and carefully examined and considered the same and in my judgment it contains all parts of the record, proceedings and evidence in the case necessary or essential to a review thereof; and the same is made part of the record herein.

Done at the City and County of Denver, in said Judicial District and State, this 9th day of February, A. D. 1915.

[SEAL.]

CHARLES C. BUTLER, *Judge.*

Tendered to me for signature by counsel for defendant- this 20th day of January A. D. 1915.

CHAS. C. BUTLER, *Judge.*

O. K. as to form.

E. N. CLARK,

R. G. LUCAS,

Attys. for Pltff.

O. K.

J. J. LIEBERMAN,

Of Counsel for Defts.

168 Forasmuch as the above and foregoing record on error contains the assignments of error relied on, together with so much of the pleadings, proceedings and evidence, or other matters, in the action as may be necessary to present the errors complained of to the Supreme Court of Colorado, including all rulings, orders, objections and exceptions occurring upon the trial of said cause necessary for such purpose, counsel for plaintiff in error respectfully prays that the judge who tried said cause approve, settle, sign and certify the same as the record on error in said cause, in accordance with the statutes of the State of Colorado and the rules of the Supreme Court of said State in such case made and provided.

I, the undersigned Judge, before whom this cause was tried, do hereby approve, settle and sign the above and foregoing record on error as the record on error in said cause, this 9th day of February, A. D. 1915.

CHARLES C. BUTLER,
*Judge District Court of Second Judicial
District of the State of Colorado.*

I, the undersigned Judge, before whom the above entitled cause was tried, do hereby certify that I have fully and carefully examined and considered the above and foregoing record in connection with the assignments of error, and that in my judgment the same contains all parts of the record, proceedings and evidence in the cause necessary or essential to a review of the errors assigned, together with the objections and exceptions to all rulings and orders of the court in said cause, and I do hereby accordingly certify the above and foregoing record as the record on error in said cause, this 9th day of February A. D. 1915.

CHARLES C. BUTLER,
*Judge District Court of the Second Judicial
District of the State of Colorado.*

8583.

Filed in the Supreme Court of the State of Colorado Feb. 17, 1915.
James R. Killian, Clerk.

169 STATE OF COLORADO,
City and County of Denver, ss:

In the District Court of the Second Judicial District of the State of Colorado.

I, J. Sherman Brown, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be the original record certified and filed in cause No. 57865, The Denver and Rio Grande Railroad Company, a corporation, Plaintiff, vs. City and County of Denver, a Municipal Corporation, et al., Defendants, wherein the Honorable Charles C. Butler was trial Judge.

Witness my hand and seal of said Court, at the Court House in Denver, County and State aforesaid this 9th day of February, A. D. 1915.

[SEAL.]

J. SHERMAN BROWN, *Clerk.*

170 And afterwards, and on to-wit the 9th day of October, A. D. 1917, Remittitur from the Supreme Court of the State of Colorado, was filed in our said court.

And said Remittitur is in words and figures as follows, to-wit:

It is considered by the Court that the plaintiff take nothing
 173 by its said suit, and that the said defendants go hence hereof
 and have and recover of and from said plaintiff their costs
 in this behalf laid out and expended, to be taxed and have execution
 therefor.

And it is further considered by the Court that this cause be, and
 the same hereby is, dismissed.

174 And afterwards, for the purpose of consolidating and com-
 pleting the entire record of this proceeding for use upon Writ
 of Error to the Supreme Court of the United States and on to-wit:
 October 24, 1917, the Clerk of the Supreme Court of Colorado re-
 turned and remitted to and lodged with the Clerk of the District
 Court of the City and County of Denver, the record of the said case
 in the Supreme Court of Colorado, to-wit: City and County of Denver,
 et al., versus The Denver and Rio Grande Railroad Company No.
 8583; and on October 24, 1917, the said Clerk of the Supreme Court
 of Colorado, duly filed with the Clerk of said District Court of the
 City and County of Denver, the following original certified copy of
 the opinion rendered by the Supreme Court of Colorado, in said
 case, the following original certified copy of the petition for re-
 hearing duly filed in said Supreme Court of Colorado, and the fol-
 lowing original certified copy of the order of said Supreme Court of
 Colorado, denying a rehearing, together with the certificate of the
 Clerk of said Supreme Court of Colorado attached to said certified
 copies:

175 Filed in District Court, City & County of Denver, Colo.,
 Oct. 24, 1917. J. Sherman Brown, Clerk.

STATE OF COLORADO, ss:

Pleas in the Supreme Court of the State of Colorado.

Present:

Hon. S. Harrison White, Chief Justice,
 " William A. Hill, Associate Justice,
 " James E. Garrigues, " "
 " Tully Scott, " "
 " James H. Teller, " "
 " Morton S. Bailey, " "
 " George W. Allen, " "
 " Leslie E. Hubbard, Attorney General,
 Mr. James R. Killian, Clerk.
 Mr. William T. Heiskell, Bailiff.

Be it remembered: That heretofore and on to-wit: the fourth day
 of June, A. D. 1917, there was filed in our said Supreme Court the
 original opinion in the following case, to-wit: City and County of

Denver, et al., vs. The Denver and Rio Grande Railroad Company, Number 8583, which opinion is in words and figures as follows, to-wit:

176 Filed in District Court, City & County of Denver, Colo., Oct. 24, 1917. J. Sherman Brown, Clerk.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation, Defendant in Error.

Error to the District Court of the City and County of Denver.

Hon. Charles C. Butler, Judge.

Mr. I. N. Stevens, City Attorney; Mr. George Q. Richmond, Assistant City Attorney; Mr. Jacob J. Lieberman, Assistant City Attorney; Mr. James A. Marsh, City Attorney; Mr. Norton Montgomery, Assistant City Attorney, for Plaintiffs in Error.

Mr. E. N. Clark, Mr. R. G. Lucas, Mr. J. G. McMurry, for Defendant in Error.

Mr. Justice BAILEY delivered the opinion of the Court:

177 This action was brought by The Denver & Rio Grande Railroad Company to restrain the City and County of Denver from enforcing Ordinance Number 34, Series of 1914, by which the city seeks to compel the removal of a certain railroad track at the intersection of Seventeenth and Wynkoop Streets, in Denver. The trial court found the ordinance illegal and void, and an injunction was issued restraining the city from interfering with the track, reserving to it, however, the right to determine the extent of the powers and privileges of the railroad company after the expiration of its charter. To this judgment the city assigns error, and brings the cause here for review.

For convenience the railroad company will be designated as plaintiff and the city as defendant, as in the court below. Briefly, their respective contentions are as follows: The company alleges that it has authority by legislative enactment to occupy the street; that an ordinance passed in 1871, ratified by Congress in 1872, and further

cipality. It is the general rule that the right to exercise the police power cannot be alienated, surrendered or abridged, either by the legislature or by the municipality acting under legislative authority, by any grant, contract or delegation, because it constitutes the exercise of a governmental function without which the state would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police power of the state, operating through legislative enactment or municipal action. *New York v. Squire*, 145 U. S. 175; *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co., v. Murphy*, 170 U. S. 78; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 16."

And at sec. 1270:

"The basis of the exercise of the police power is the protection of human life and the protection of public convenience and welfare. Municipal regulations not having a fair relation to these subjects are unreasonable, but when they fairly tend to promote these objects, they are generally sustained. *Weage v. Chic. & W. I. R. Co.*, 227 Ill. 421; *Commonwealth v. Warwick*, 185 Pa. 623; *Commonwealth v. Philadelphia*, 23 Pa. Sup. Ct. 205."

In *Atlantic, etc., Ry. Co. v. Mayor, et al.*, 128 Ga. 293, it was held that a regulation requiring a railroad to change the location of its track was a legitimate exercise of police power when such regulation is reasonable and tending to promote the general welfare and
181 convenience of the public. In *McQuillin on Municipal Corporations* the following rule is laid down at sec. 1682:

"In the control of street railroads reasonable rules may be laid down by the municipality to compel the removal of turnouts, the laying of switches, the construction of bridges, etc. So for the convenience and welfare of the public, a municipality may require the tracks of a railroad company to be shifted from one street to another, or from one part of the street to the other."

For twenty years the company has abandoned the track as a part of its main line, and its use as a switch track has been permitted by ordinances passed from time to time. The growth of the city, the subsequent increase of traffic across the intersection, and its augmented importance as a thoroughfare, make it apparent that the municipality has justly concluded that it is in the interest of the public to restore the street exclusively to its original use. Viewing the interests of those served by the track on the one hand, and the rights of the public upon the other, and taking into consideration the fact that those now using the track may be equally well accomodated in another manner, the ordinance for its removal is eminently reasonable.

In *Reinman v. Little Rock*, 237 U. S. 171, the question of municipal power to declare what shall be considered a nuisance is discussed as follow-:

"While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and

operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily chosen, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment."

In *Delaware, etc. R. R. Co. v. Buffalo*, 158 N. Y. 266, the railway company had constructed certain abutments and piers in the city of Buffalo, to support a portion of their track. These abutments occupied about one-half of the street. In discussing a resolution 182 of the common council ordering the removal of these abutments and piers the court said:

"It was urged by the learned counsel for the plaintiff that the city authorities have no right to forcibly remove this structure over the street. That depends upon the question whether or not it was an encroachment upon the public right and an obstruction. If it was, the city had a right to remove it. If, by the increase of the population, or the increase of public travel, the street had become dangerous in consequence of the existence of the abutments and piers, the city would be clearly liable for any damages which persons, in the lawful use of the highway, sustained by accidents due to the presence of such obstructions in the street. * * * It is equally clear that the plaintiff cannot justify the occupation of the street upon the ground that the municipal authorities originally consented to the erection of the structure. The common council of the city has no power to surrender a public street to the use of a railroad corporation."

The Supreme Court of the United States, in *Y. Y. etc. Ry. Co. v. Bristol*, 151 U. S. 556, in discussing the power of the State Railroad Commission to require the railroad company to remove a grade crossing, said:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection cannot be contracted away, nor can the exercise of the rights granted, nor the use of the property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27; *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 650; *Mugler v. Kansas*, 123 U. S. 623; *Budd v. New York*, 143 U. S. 517."

Under the principles laid down in the authorities quoted, it is clear that the ordinance here being attacked by the railway company is a reasonable and constitutional one. The company must, therefore, give way to the paramount interest of the public.

Judgment reversed and cause remanded with instructions to dismiss it.

Decision en Banc.

183 Filed in District Court, City & County of Denver, Colo., Oct. 24, 1917. J. Sherman Brown, Clerk.

And afterwards and on, to-wit, July 10, 1917, defendant in error duly filed its petition for a rehearing, which petition is in words and figures as follows, to-wit:

In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, et al,
Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant in Error.

Error to the District Court of the Second Judicial District of Colorado within and for the City and County of Denver.

Petition for Rehearing.

Comes now the defendant in error and respectfully petitions the court to reconsider the opinion of the court heretofore delivered in this cause and grant a rehearing herein, and upon such rehearing vacate and recall said opinion, and affirm the judgment of the trial court, upon the grounds that:

I. This court erred in holding that the plaintiff in error has power to remove the track in question "without regard to the character of the rights upon which it was first established and maintained," for the following reasons:

1. The track was constructed and put in operation under authority from the United States Government and authority from the
184 Territory of Colorado, and later the State of Colorado. The rights and franchises thus acquired were not subject to revocation by the City of Denver.

2. The right acquired by defendant in error from the Federal, Territorial and State sources was ratified and confirmed by plaintiff in error and was the basis of the orders requiring the defendant in error to make improvements and to expend large sums of money for paving Wynkoop Street. These conditions estop plaintiff in error to destroy said right by a professed exercise of the police power.

II. The Court erred in ascribing to plaintiff in error authority under the police power to appropriate or destroy private property of defendant in error without compensation and without due process of law, in contravention of Article V, section 1 and Article XIV of the Amendments to the Constitution of the United States, and Article II, sections 15 and 25 of the Constitution of the State of Colorado, for the following reasons:

1. The right of defendant in error to maintain the track in question is based upon Federal, Territorial, State and Municipal grants and authority, and upon ratification and acquiescence of plaintiff in error, and are property rights vested in defendant in error, which plaintiff in error could not impair or appropriate without "just compensation" guaranteed by Article V, Section 1 of the Amendments to the Constitution of the United States and ascertained in accordance with Article II, Section 15 of the Constitution of Colorado.

2. Destruction, revocation or appropriation of the right under the guise of the police power to regulate is not due process of law guaranteed by Article V, Section 1, and Article XIV of the Amendment-
185 to the Constitution of the United States, and by Article II, Section 25 of the Constitution of Colorado.

III. The Court erred in holding that the contract under which defendant in error occupies and uses the street can be impaired by plaintiff in error in violation of Article I, Section 10 of the Constitution of the United States, and of Article II, Section 11 of the Constitution of Colorado, for the following reasons:

1. The right to occupy the street with a track is a property right which is protected as property the right to use the street in a certain way, to wit, for railroad operation, and the right to collect fares and rates for service is a contract right protected as such by the Constitution of the United States and of the State of Colorado.

2. The police power is limited by the prohibition of the Constitution in respect to impairing contracts as well as the prohibitions in respect to taking or damaging physical or other property.

IV. The Court erred in holding that the ordinance is a valid exercise of the police power, although its enforcement would break a line of railroad engaged in interstate commerce, and would, therefore, violate Article I, Section 8 of the Constitution of the United States.

1. To break at Seventeenth Street the track located on Wynkoop Street, would make it impossible for defendant in error to
186 operate that portion of its line east of Seventeenth Street, and would thereby directly interfere with the continuous line engaged in interstate commerce.

2. The Federal statutes and the Federal Constitution relating to commerce between the States supersede the police and all other powers of the State in conflict with the statutes and policy of the Federal Constitution and government in respect to interstate commerce.

V. The Court erred in finding that the track in question "is a continuing nuisance and menace", for the following reasons:

1. The record does not show any restriction of travel due to the mere existence of the track.

2. The record shows no interference with travel over the street in question due to the operation of one train each way each day, occupying less than ten minutes.

3. The record shows no injury to persons or property by the existence of the track or by such operation thereof.

4. Nuisance is not a legislative conclusion. It is a fact, and plain-

tiff in error could not by ordinance or otherwise declare that, a nuisance which is in fact not a nuisance. The track in question was established under competent authority and is now operated under legal authority and regulation. It is beyond the power of the City to declare the existence of the track or such operation thereof to be a nuisance, and the record in this case does not furnish the basis for a conclusion by this court that it is a nuisance and menace.

187 VI. The Court erred in testing the present right of plaintiff in error to maintain and operate the track in question by considering possible but wholly problematic developments in future, for the following reasons:

1. The fact that railroad timetables may be changed so as to bring a large number of people to the station between one o'clock and four o'clock A. M. would not destroy the present right to operate the track between those hours.

2. Changing railroad timetables so as to cause a large number of trains to depart from or arrive at the Union Station between the hours of one o'clock and four o'clock A. M. is possible, but wholly improbable. If, however, changes should at some future time render the operation of the track in question dangerous, the City could at such time, but not until that time, take proper action to regulate the operation.

3. The suggestion of the court that timetables may be thus changed is wholly outside the record, is pure speculation, and is in the nature of judicial testimony.

VII. The Court erred in testing the right of defendant in error to use the track by reference to conditions which are not determinative, viz:

1. A change of use from main line to switch:

- (a) The property right of defendant in error is not measured by the extent of use, nor is it qualified by the character of use.

- (b) Lessening the use by defendant in error indicates a reduction of the burden upon the street and is, therefore, a mitigating circumstance in favor of defendant in error instead of an aggravation, as implied by the court.

188

- (c) The nature of the service rendered to patrons and the number of patrons served do not measure the right of defendant in error.

- (d) The original rights have never been taken away and those rights covered the construction and maintenance of side and switch tracks as well as main line.

- (e) The subsequent ordinances were not permissive ordinances as stated by the court, but, on the contrary, were confirmatory of prior ordinances and gave additional rights.

2. Defendant in error reaches the Union Station by another route, and industries between Seventeenth and Nineteenth Streets can be served by another route:

- (a) That defendant in error has another route to some point not involved in the case has no bearing upon the right of defendant in error to use the track in question to reach some point involved in the case.

(b) The fact that industries may use a railroad competitive with the railroad of defendant in error does not tend to show that defendant in error has no right in the street or can be deprived of its right without due process of law.

3. The interests of those served by the track in question and the interests of the public contrasted indicate that the public interest is greater than the interest of those so served.

(a) Balancing the public against those served by the track, ignores the rights of defendant in error.

189 (b) The test of the public right is "overruling necessity," not mere convenience.

In support of this petition, defendant in error appends a brief of argument and authorities.

Respectfully submitted,

E. N. CLARK,

J. G. McMURRY,

Attorneys for Defendant in Error.

And afterwards and on, to wit, October 8, 1917, the said Supreme Court of the State of Colorado, denied a rehearing in said case, which order of denial is in words and figures as follows:

190 Filed in District Court, City & County of Denver, Colo., Oct. 24, 1917. J. Sherman Brown, Clerk.

In the Supreme Court of the State of Colorado.

8583.

CITY AND COUNTY OF DENVER et al., Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Defendant in Error.

Error to the District Court of the City and County of Denver.

The Court having considered the arguments of counsel upon the petition for a rehearing, and being now well advised in the premises, doth order that said petition be, and the same is hereby, denied, this eighth day of October, A. D. 1917.

191 Filed in District Court, City & County of Denver, Colo.,
Oct. 24, 1917. J. Sherman Brown, Clerk.

In the Supreme Court of the State of Colorado.

8583.

CITY AND COUNTY OF DENVER et al., Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Defendant in
Error.

I hereby certify and transmit to the district court of the City and County of Denver a certified copy of the opinion rendered by said Supreme Court in said case, together with a certified copy of the petition for rehearing together with a certified copy of the order denying a rehearing, which certified copies are hereto attached, and I hereby certify the same to be full, true and correct as the same appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Denver, State of Colorado, this October 24th, A. D. 1917.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of the State of Colorado,
By JAMES PERCHARD,
Deputy Clerk.

192 STATE OF COLORADO,
City and County of Denver, ss:

In the District Court.

Clerk's Certificate to Transcript of Record.

I, J. Sherman Brown, Clerk of the District Court City and County of Denver, State of Colorado, do hereby certify that the foregoing folios numbered from 1 to 530 inclusive, are a full, correct and complete transcript of the record and proceedings in the case of The Denver and Rio Grande Railroad Company versus City and County of Denver, et al., number 57865 in this court and as well a full, correct and complete transcript of the record and proceedings in the case of The City and County of Denver et al., Plaintiff in Error versus The Denver and Rio Grande Railroad Company, Defendant in Error, number 8583 in the Supreme Court of Colorado (being the same case on Writ of Error to said Supreme Court of Colorado) including the Opinion of said Supreme Court of Colo-

rado and including the Petition for Rehearing filed by said Denver and Rio Grande Railroad Company in the said Supreme Court of Colorado, and including the Order of said Supreme Court denying a rehearing, all as now appears on file in my office, where the completed record of the entire proceedings under both titles and the final judgment entered in said case, pursuant to the directions of the said Supreme Court of Colorado, now remain.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, in the City and County of Denver, Colorado, at my office, in the City and County of Denver and State of Colorado, this 25th day of October A. D. 1917.

[Seal District Court, City and County of Denver, Colo.]

J. SHERMAN BROWN,
Clerk of the District Court,
By CORNELIUS WESTERVELT,
Deputy Clerk.

193 And on to-wit October 18, 1917, the following original petition for Writ of Error to the Supreme Court of the United States and the allowance of the said Writ duly endorsed thereon, together with the following original Assignments of Error were duly filed in the said District Court of the City and County of Denver.

194 Friday, Oct. 19, 1917.

Filed 10-18-'17.

Filed in District Court, City & County of Denver, Colo., Oct. 18, 1917. J. Sherman Brown, Clerk.

In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

VS.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant in Error.

(Same Case in Trial Court.)

In the District Court of the City and County of Denver, State of Colorado, Div. III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Petition for Writs of Error.

Considering itself aggrieved by the judgment of the Supreme Court of Colorado remitting said cause to said District Court with instructions to dismiss the same, and by said final judgment 195 of the District Court of the City and County of Denver entered upon direction from the Supreme Court of the State of Colorado, dismissing the said cause in said District Court at the costs of your petitioner and dissolving the said decree entered by the said District Court in said cause, perpetually enjoining the City and County of Denver and its officers from enforcing or attempting to enforce ordinance number thirty-four (34) of the Series of 1914, The Denver and Rio Grande Railroad Company as plaintiff in error hereby prays for two writs of error from the Supreme Court of the United States, one directed to the Supreme Court of Colorado and the other directed to the District Court of the City and County of Denver, the same to operate as a supersedeas, Assignments of error herewith.

E. N. CLARK,

J. G. McMURRY,

*Attorneys for Plaintiff in Error to the
Supreme Court of the United States.*

Filed in District Court, City & County of Denver, Colo., Oct. 18, 1917. J. Sherman Brown, Clerk.

Let the writs of error issue upon the execution of a bond by The Denver and Rio Grande Railroad Company to the City and County of Denver, in the sum of One Thousand (\$1,000.00) Dollars, said

bond to be filed in the office of the Clerk of the District Court of the City and County of Denver and a copy in the office of the Clerk of the Supreme Court of Colorado. The said writs are hereby made to operate as a supersedeas upon the execution and filing of said bond.

Signed the 18th day of October, 1917, at Denver, Colo.

CHARLES C. BUTLER,
*Presiding Judge of the District Court of the
City and County of Denver, Colorado.*

S. HARRISON WHITE,
Chief Justice of the Supreme Court of Colo.

(S. L. 10/18/17.)

196 Filed in District Court, City & County of Denver, Colo., Oct. 18, 1917. J. Sherman Brown, Clerk.

In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Defendant in Error.

In the District Court of the City and County of Denver, State of Colorado, Div. III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Assignments of Error.

Comes now The Denver and Rio Grande Railroad Company, plaintiff in the District Court of the City and County of Denver, and

defendant in error in the Supreme Court of the State of Colorado, and files herewith its petition for writs of error and says that there are errors in the record and proceedings of the above-entitled causes and in the final judgment entered by the said District Court upon direction from the said Supreme Court of Colorado, prejudicial to its rights, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignments of error:

The final judgment entered by said District Court upon direction from said Supreme Court of Colorado is erroneous in that said Supreme Court of Colorado erred in reversing the decree of said District Court in favor of The Denver and Rio Grande Railroad Company, in denying a rehearing, and in issuing a remittitur returning said cause to said District Court with an order to dismiss the same, and the said District Court erred in entering the said judgment of dismissal, all of which errors exist in the following particulars, to-wit:

First. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in holding that the defendant in error, the City and County of Denver, has power and authority to remove the railroad track in Wynkoop street in said City "without regard to the character of the rights upon which it was first established and maintained," for the reason that the said track was located, constructed, maintained and operated under authority granted by the Act of Congress approved March 2, 1867 (14 Statutes at Large 426), and under and by virtue of the incorporation of The Denver and Rio Grande Railway Company, predecessor of the plaintiff in error herein, on April 27, 1870; that said incorporation was perfected in pursuance of the Act aforesaid, and specific rights, privileges and franchises to locate, construct, maintain and operate said track were conferred and granted by an Act of the Congress of the United States, approved June 8, 1872 (17 Statutes at Large 339), which said rights, privileges and franchises were thereafter ratified and confirmed by an Act of Congress approved June 18, 1872 (17 Statutes at Large, 390), and further recognized by curative Act of Congress approved June 3, 1874 (18 Statutes at Large 516), and the lawful and corporate existence of the said The Denver and Rio Grande Railway Company, and all powers, privileges and franchises conferred upon said Company were expressly ratified, confirmed and legalized by Act of Congress approved March 3, 1875 (18 Statutes at Large 516), and further said rights and privileges were recognized and confirmed by an Act of Congress approved June 3, 1875 (18 Statutes at Large 482). From all of which it appears that the rights, privileges and franchises of plaintiff in error to locate, construct, maintain and operate a railroad track in said Wynkoop street within the boundaries of said Seventeenth street in the City of Denver were granted and conferred and thereafter ratified and confirmed by the Congress of the United States of America, and are not subject to revocation or destruction by defendant in error, the City and County of Denver, a municipal corporation of inferior sovereign power

created and existing by an act of the legislature of the Territory of Colorado (Laws of Colorado, 1866, page 95), and the Towns and Cities Act of said legislature of 1867 (Revised Statutes of Colorado 1868, page 602).

Second. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State, erred in ascribing to defendant in error authority under the police power to destroy or appropriate private property of plaintiff in error without compensation and without due process of law in contravention of Article V, section 1, of the amendments to the constitution of the United States which provide that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation.

Third. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State, erred in ascribing to defendant in error authority under the police power to destroy or appropriate private property of plaintiff in error without compensation and without due process of law in contravention of Article XIV, paragraph 1, of the amendments to the constitution of the United States, which provides that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in holding that the contract and franchises under which plaintiff in error and its predecessor, The Denver and Rio Grande Railway Company, located, constructed, maintained and operated a railroad track in Wynkoop Street within the boundaries of Seventeenth Street in said City of Denver, can be abrogated by defendant in error, the City and County of Denver, in violation of Article I, section 10 of the constitution of the United States, which provides that no State can pass any law impairing the obligations of contracts.

Fifth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in holding that the ordinance of the City and County of Denver of March 30, 1914, being Ordinance number thirty-four (34) of the Series of 1914, repealing all prior ordinances granting or recognizing the right of plaintiff in error to maintain and operate its railroad track in Wynkoop street within the boundaries of Seventeenth street in said City of Denver, is a valid exercise of the police power, when the enforcement of said ordinance necessarily results in breaking a line of railroad engage- in interstate commerce, and constitutes a violation of Article I, section 8, of the constitution of the United States which provides that Congress shall have power to regulate commerce among the several states of the United States and under the circumstance and condition that the Congress of the United States had prior to the passage of said ordinance, passed an Act approved February 4, 1887 (24 Statutes at Large, 379), and thereafter had passed various acts amending

said Act, all of which relate to the regulation of commerce between the States of the United States.

Sixth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in finding and holding that the maintenance by plaintiff in error of a railroad track in Wynkoop street within the boundaries of Seventeenth street, in said City of Denver, is a continuing nuisance and menace, there being no testimony or evidence upon which such finding could be legally based, and such finding involving the repeal, abrogation and destruction of rights, franchises, grants and property vested in the plaintiff in error by the Congress of the United States by the Acts aforesaid, and protected by the Constitution of the United States as aforesaid.

Seventh. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in finding and considering possible but wholly problematic development in the use of Wynkoop Street and 17th Street, in said City of Denver, and basing upon such possible and speculative uses, the power of defendant in error to require plaintiff in error to remove from said street its track, there being no evidence upon which the conclusions and speculations of the court as to such possible future use could be legally based, and such conclusions and speculations being contrary to and destructive of the Acts of Congress aforesaid and violative of the constitutional guarantees.

Eighth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of the State of Colorado, erred in considering and giving weight to certain conditions and alleged facts which had no legal bearing upon the nature of the right of plaintiff in error and were wholly irrelevant to and un-determinative of the power of defendant in error to enact and enforce that certain ordinance of March 30, 1914, being Ordinance No. 34 of the Series of 1914, which alleged conditions and facts, if existent, could not control as against a grant by the Congress of the United States aforesaid and the constitutional guarantees aforesaid.

Ninth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of the State of Colorado, erred in holding that the right, franchises and property of plaintiff in error could be destroyed by exercise of the police power irrespective of whether or not such destruction was necessary for public welfare and in holding that a destruction of the rights of plaintiff in error was necessary when the evidence failed to show such necessity, and in holding that regulation of the exercise of the rights by plaintiff in error would not amply protect the public when there was no evidence that any effort had been made to regulate the exercise of said rights and when there was no evidence that regulation would not be amply sufficient to protect public rights, and in making various and sundry findings and rulings without any evidence or without sufficient evidence upon which to base such findings and rulings, all of which unlawful proceedings resulted in a violation of

202 the contract and franchise rights of the plaintiff in error and in depriving plaintiff in error of its property without legal evidence and due process of law, all in contravention of the provisions of the constitution of the United States and the amendments thereof, and in violation of the law and equity applicable to the case.

For which errors The Denver and Rio Grande Railroad Company as plaintiff in error to the Supreme Court of the United States prays that the final order of said Supreme Court of October 8, 1917, remitting said cause to said District Court with instructions to dismiss the same, be reversed and set aside, and that the final judgment of the District Court of the City and County of Denver, Colorado, entered upon direction from the Supreme Court of Colorado, upon October 9, 1917, wherein and whereby said cause in said District Court was dismissed at the costs of this plaintiff in error and the decree of said District Court perpetually enjoining the City and County of Denver and its officers from enforcing said ordinance of said City and County of Denver, number 34 of the Series of 1914, was dissolved, be reversed and set aside, and that a decree by the Supreme Court of the United States be entered declaring said ordinance unconstitutional and void, and perpetually enjoining said City and County of Denver and its officers from enforcing or attempting to enforce the said ordinance number 34 of the Series of 1914, and granting this plaintiff in error such other relief as to said Supreme Court of the United States seems right in the premises, including judgment for costs.

E. N. CLARK,
J. G. McMURRY,

*Attorneys for The Denver and Rio Grande
Railroad Company, Plaintiff in Error
to the United States Supreme Court.*

203 And the bond provided for in the said allowance of said Writ of Error was duly filed in the said District Court of the City and County of Denver on October 18, 1917, and is in words and figures as follows; to-wit:

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Defendant in Error.

(Same Case in Trial Court.)

In the District Court of the City and County of Denver, State of Colorado, Division III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Plaintiff.

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Bond.

Know all men by these presents, That The Denver and Rio Grande Railroad Company is held and firmly bound unto the City and County of Denver, State of Colorado, in the sum of one thousand (\$1,000) dollars, to be paid to the said City and County of Denver, State of Colorado, to which payment well and truly to be made, the said The Denver and Rio Grande Railroad Company binds itself firmly by these presents, and as security for such payment, the said The Denver and Rio Grande Railroad

Company hereby deposits with the clerk of the District Court of the City and County of Denver, Colorado, the sum of \$1,000.

Sealed with our seals and dated this October 18, 1917.

Whereas, the above named The Denver and Rio Grande Railroad Company seeks as plaintiff in error to prosecute its writs of error from the Supreme Court of the United States to review and reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Colorado, in remitting said cause to the District Court of the City and County of Denver with instructions to dismiss the same, and also to review and reverse the judgment of the said District Court dismissing said cause pursuant to said direction of the Supreme Court of the State of Colorado.

Now, therefore, the condition of this obligation is such, that if the above named The Denver and Rio Grande Railroad Company as plaintiff in error shall prosecute its said writs of error to effect and answer all costs and damages that may be adjusted if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE DENVER AND RIO GRANDE
RAILROAD COMPANY,

(Principal),

(Signed) By T. H. MARSHALL, *Treasurer.*

Attest:

(Signed) J. B. ANDREWS,
[SEAL.] *Assistant Secretary.*

Recd. the \$1,000 deposit provided for in this bond this Oct. 18/17.

(Signed) J. SHERMAN BROWN, *Clerk, etc.,*

(Signed) By CORNELIUS WESTERVELT,
Deputy.

This bond approved.

(Signed) S. HARRISON WHITE,
*Chief Justice of the Supreme Court
of the State of Colorado.*

(Signed) CHARLES C. BUTLER,
*Presiding Judge of the District Court of the
City and County of Denver, Colorado.*

205 And there was filed in the said District Court of the City and County of Denver on October 18, 1917, the following original Citation, and the following original Writ of Error, from the Supreme Court of the United States:

206 Filed in District Court, City & County of Denver, Colo., Oct. 18, 1917. J. Sherman Brown, Clerk.

In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Defendant in Error.

(Same Case in Trial Court.)

In the District Court of the City and County of Denver, State of Colorado, Div. III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Plaintiff

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Citation.

THE UNITED STATES OF AMERICA,
State of Colorado, ss:

The President of the United States to City and County of Denver, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, their respective successors in office, and to James A. Marsh, Attorney for the said City and County of Denver and the said officers:

207 You are hereby respectively cited and admonished to appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Colorado wherein The Denver and Rio Grande Railroad Company is plaintiff in error and the City and County of Denver, et al., are defendants in error, and also pursuant to a writ of error filed in the office of the Clerk of the District Court of the City and County of Denver wherein The Denver and Rio Grande Railroad Company is plaintiff in error and the City and County of Denver, et al., are defendants in error, then and there to show cause, if any there be, why the judgment of the Supreme Court of Colorado, remitting said cause to said District Court with instructions to dismiss the same, and the final judgment of said District Court dismissing said cause upon the Direction of the Supreme Court of Colorado, as in said writs of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Colorado, and the Presiding Judge of the District Court of the city and county of Denver, Colorado, this October 18th, 1917.

S. HARRISON WHITE,
*Chief Justice. Supreme Court of the
State of Colorado.*

Attest:

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
*Clerk of the Supreme Court of the
State of Colorado,*

By JAMES PERCHARD,
Deputy Clerk.

CHARLES C. BUTLER,
*Presiding Judge of the District Court of the
City and County of Denver, Colorado.*

Attest:

[Seal District Court, City and County of Denver, Colo.]

J. SHERMAN BROWN,
*Clerk of the District Court of the City
and County of Denver, Colo.,*

By CORNELIUS WESTERVELT, *Deputy.*

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Acceptance of Service of Citation.

I, James A. Marsh, Attorney for the City and County of Denver and Attorney of Record for each of the persons in the foregoing entitled cases to which this citation is addressed, do hereby acknowledge due and personal service of the above citation, and the receipt of a copy thereof at my office in Denver, Colorado, this October 18th, 1917.

J. A. MARSH.

(S. L. 10/18/17.)

209 Filed in District Court, City & County of Denver, Colo., Oct. 18, 1917. J. Sherman Brown, Clerk.

Writ of Error.

UNITED STATES OF AMERICA,
State of Colorado, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the City and County of Denver, Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you

at the October Term, 1917, thereof, between The Denver and Rio Grande Railroad Company, a corporation, plaintiff, against the City and County of Denver, a municipal corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum as Commissioner of Property of said City and County of Denver, defendants, No. 57865, a manifest error hath happened, to the great damage of the said The Denver and Rio Grande Railroad Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C. and filed in the office of the clerk of the Supreme Court of the United States on or before the 17th day of November, 1917, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Edward D. White, Chief Justice of the United States, this 18th day of October, in the year of our Lord, one thousand nine hundred and seventeen, and of the Independence of the United States, the one hundred and forty-second year. Issued, at office in the city and county of Denver, in said district, with the seal of the district court of the United States for the district of Colorado, and dated as aforesaid.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP,
*Clerk United States District Court,
District of Colorado.*

Allowed by:

CHARLES C. BUTLER,
*Presiding Judge of the District Court of
the City & County of Denver, Colorado.*

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Return.

STATE OF COLORADO,
City and County of Denver, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the district court of the City and County of Denver, Colorado, at the city and county of Denver, in said state, this 25- day of October, A. D. 1917.

J. SHERMAN BROWN, *Clerk*,
By CORNELIUS WESTERVELT,
Deputy Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

The plaintiff in error, having served this writ, by lodging a copy thereof on October 18, 1917, in the clerk's office where the record remains, and having given the security required by law, on the issuing of the citation, within the time required by law, this writ therefore becomes a supersedeas.

In witness whereof, I hereunto subscribe my name, and affix the seal of the district court of the United States for the district of Colorado, at the city and county of Denver, in said district, this 25th day of October, A. D. 1917.

J. SHERMAN BROWN, *Clerk*,
By CORNELIUS WESTERVELT, *Deputy*.

[Endorsed:] No. —. The Supreme Court of the United States. The Denver & Rio Grande Railroad Company, Plaintiff in Error, vs. The City and County of Denver et al., Defendants in Error. Writ of error. — — —, Attorney for Plaintiff- in Error.

211 STATE OF COLORADO,
City and County of Denver, ss:

In the District Court.

I, J. Sherman Brown, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify that there was lodged and filed with me as such Clerk on October 18, 1917, In the Matter of the Denver and Rio Grande Railroad Company versus The City and County of Denver, et al., No. 57865, the Bond, a true copy of which is herein set forth; and I further certify that said foregoing original Petition for Writ of Error to the Supreme Court of the United States with the allowance thereof duly endorsed thereon, said original Assignments of Error, said original Citation and said original Writ of Error hereinbefore set forth, were duly filed in my office on October 18, 1917, and I further certify that on said October 18, 1917, there was duly lodged with me as Clerk of the said District Court of the City and County of Denver two copies of

the said Writ of Error, one for the defendants in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City and County of Denver, State of Colorado, this October 25 A. D. 1917.

J. SHERMAN BROWN,

Clerk of the District Court.

By CORNELIUS WESTERVELT, *Deputy.*

212 And on to-wit October 18, 1917, the following original Petition for Writ of Error to the Supreme Court of the United States and the allowance of said writ duly endorsed thereon, and the following original Assignments of Error were duly filed in the Supreme Court of Colorado:

213 Filed in the Supreme Court of the State of Colorado Oct. 18, 1917. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

VS.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant in Error.

(Same Case in Trial Court.)

In the District Court of the City and County of Denver, State of Colorado, Div. III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

VS.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Petition for Writs of Error.

Considering itself aggrieved by the judgment of the Supreme Court of Colorado remitting said cause to said District Court with instructions to dismiss the same, and by said final judgment of the
214 District Court of the City and County of Denver entered upon direction from the Supreme Court of the State of Colorado, dismissing the said cause in said District Court at the costs of your petitioner and dissolving the said decree entered by the said District Court in said cause, perpetually enjoining the City and County of Denver and its officers from enforcing or attempting to enforce ordinance number thirty-four (34) of the Series of 1914, The Denver and Rio Grande Railroad Company as plaintiff in error hereby prays for two writs of error from the Supreme Court of the United States, one directed to the Supreme Court of Colorado and the other directed to the District Court of the City and County of Denver, the same to operate as a supersedeas. Assignments of error herewith.

E. N. CLARK,

J. G. McMURRY,

*Attorneys for Plaintiff in Error to the
Supreme Court of the United States.*

Let the writs of error issue upon the execution of a bond by The Denver and Rio Grande Railroad Company to the City and County of Denver, in the sum of One Thousand (\$1,000.00) Dollars, said bond to be filed in the office of the Clerk of the District Court of the City and County of Denver and a copy in the office of the Clerk of the

Supreme Court of Colorado. The said writs are hereby made to operate as a supersedeas upon the execution and filing of said bond. Signed the 18th day of October, 1917, at Denver, Colo.

S. HARRISON WHITE,
Chief Justice of the Supreme Court of Colo.
 CHARLES C. BUTLER,
*Presiding Judge of the District Court of
 the City and County of Denver, Colorado.*

215 In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Defendant in Error.

In the District Court of the City and County of Denver, State of Colorado, Div. III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Assignments of Error.

Comes now The Denver and Rio Grande Railroad Company, plaintiff in the District Court of the City and County of Denver, and defendant in error in the Supreme Court of the State of Colorado,

and files herewith its petition for writs of error and says that there are errors in the record and proceedings of the above-entitled causes and in the final judgment entered by the said District Court upon direction from the said Supreme Court of Colorado, prejudicial to its rights, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignments of error:

The final judgment entered by said District Court upon direction from said Supreme Court of Colorado is erroneous in that said Supreme Court of Colorado erred in reversing the decree of said District Court in favor of The Denver and Rio Grande Railroad Company, in denying a rehearing, and in issuing a remittitur returning said cause to said District Court with an order to dismiss the same, and the said District Court erred in entering the said judgment of dismissal, all of which errors exist in the following particulars, to-wit:

First. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in holding that the defendant in error, the City and County of Denver, has power and authority to remove the railroad track in Wynkoop street in said City "without regard to the character of the rights upon which it was first established and maintained", for the reason that the said track was located, constructed, maintained and operated under authority granted by the Act of Congress approved March 2, 1867 (14 Statutes at Large, 426), and under and by virtue of the incorporation of The Denver and Rio Grande Railway Company, predecessor of the plaintiff in error herein, on April 27, 1870; that said incorporation was perfected in pursuance of the Act aforesaid, and specific rights, privileges and franchises to locate, construct, maintain and operate said track were conferred and granted by an Act of the Congress of the United States, approved June 8, 1872 (17 Statutes at Large 339), which said rights, privileges and franchises were thereafter ratified and confirmed by an Act of Congress approved June 18, 1872 (17 Statutes at Large, 390), and further recognized by a curative Act of Congress approved June 3, 1874 (18 Statutes at Large 516), and the lawful and corporate existence of the said The Denver and Rio Grande Railway Company, and all powers, privileges and franchises conferred upon said Company were expressly ratified, confirmed and legalized by Act of Congress approved March 3, 1875 (18 Statutes at Large 516), and further said rights and privileges were recognized and confirmed by an Act of Congress approved June 3, 1875 (18 Statutes at Large 482). From all of which it appears that the rights, privileges and franchises of plaintiff in error to locate, construct, maintain and operate a railroad track in said Wynkoop street within the boundaries of said Seventeenth street in the City of Denver were granted and conferred and thereafter ratified and confirmed by the Congress of the United States of America, and are not subject to revocation or destruction by defendant in error, the City and County of Denver, a municipal corporation of inferior sovereign power created and existing by an act of the legislature of the Territory of Colorado (1870).

of Colorado, 1866, page 95), and the Towns and Cities Act of said legislature of 1867 (Revised Statutes of Colorado 1868, page 602).

Second. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State, erred in ascribing to defendant in error authority under the police power to destroy or appropriate private property of plaintiff in error without compensation and without due process of law in contravention of Article V, section 1, of the amendments to the constitution of the

218 United States which provide that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation.

Third. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State, erred in ascribing to defendant in error authority under the police power to destroy or appropriate private property of plaintiff in error without compensation and without due process of law in contravention of Article XIV, paragraph 1, of the amendments to the constitution of the United States, which provides that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in holding that the contract and franchises under which plaintiff in error and its predecessor, The Denver and Rio Grande Railway Company, located, constructed, maintained and operated a railroad track in Wynkoop street within the boundaries of Seventeenth street in said City of Denver, can be abrogated by defendant in error, the City and County of Denver, in violation of Article I, section 10 of the constitution of the United States, which provides that no State can pass any law impa-iring the obligations of contracts.

Fifth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in holding that the ordinance of the City and County of Denver of March 30, 1914, being Ordinance number thirty-four (34) of the Series of 1914, repealing all prior ordinances granting or recognizing the right of plaintiff in error to maintain and operate its railroad track in Wynkoop street within the boundaries of Seven-

219 teenth street in said City of Denver, is a valid exercise of the police power, when the enforcement of said ordinance necessarily results in breaking a line of railroad engage- in interstate commerce, and constitutes a violation of Article I, section 8, of the constitution of the United States which provides that Congress shall have power to regulate commerce among the several states of the United States and under the circumstance and condition that the Congress of the United States had prior to the passage of said ordinance, passed an Act approved February 4, 1887 (24 Statutes at Large 379), and thereafter had passed various acts amending said Act, all of which relate to the regulation of commerce between the States of the United States.

Sixth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in finding and holding that the maintenance by plaintiff in error of a railroad track in Wynkoop street within the boundaries of Seventeenth street, in said City of Denver, is a continuing nuisance and menace, there being no testimony or evidence upon which such finding could be legally based, and such finding involving the repeal, abrogation and destruction of rights, franchises, grants and property vested in the plaintiff in error by the Congress of the United States by the Acts aforesaid, and protected by the Constitution of the United States as aforesaid.

Seventh. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of said State of Colorado, erred in finding and considering possible but wholly problematic development in the use of Wynkoop Street and 17th Street, in said City of Denver, and basing upon such possible and speculative uses, the power of defendant in error to require plaintiff in error to remove from said street its track, there being no evidence upon which the conclusions and speculations of the court as to such possible future use could be legally based, and such conclusions and speculations being contrary to and destructive of the Acts of Congress aforesaid and violative of the constitutional guarantees.

Eighth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of the State of Colorado, erred in considering and giving weight to certain conditions and alleged facts which had no legal bearing upon the nature of the right of plaintiff in error and were wholly irrelevant to and undeterminative of the power of defendant in error to enact and enforce that certain ordinance of March 30, 1914, being Ordinance No. 34 of the Series of 1914, which alleged conditions and facts, if existent, could not control as against a grant by the Congress of the United States aforesaid and the constitutional guarantees aforesaid.

Ninth. The Supreme Court of the State of Colorado and the District Court of the Second Judicial District of the State of Colorado, erred in holding that the rights, franchises and property of plaintiff in error could be destroyed by exercise of the police power irrespective of whether or not such destruction was necessary for public welfare and in holding that a destruction of the rights of plaintiff in error were necessary when the evidence failed to show such necessity, and in holding that regulation of the exercise of the rights by plaintiff in error would not amply protect the public when there was no evidence that any effort had been made to regulate the exercise of said rights and when there was no evidence that regulation would not be amply sufficient to protect public rights, and in making various and sundry findings and rulings without any evidence or without sufficient evidence upon which to base such findings and rulings, all of which unlawful proceedings resulted in a violation of the contract and franchise rights of the plaintiff in error and in depriv-

ing plaintiff in error of its property without legal evidence and due process of law, all in contravention of the provisions of the constitution of the United States and the amendments thereof, and in violation of the law and equity applicable to the case.

For which errors The Denver and Rio Grande Railroad Company as plaintiff in error to the Supreme Court of the United States prays that the final order of said Supreme Court of October 8, 1917, remitting said cause to said District Court with instructions to dismiss the same, be reversed and set aside, and that the final judgment of the District Court of the City and County of Denver, Colorado, entered upon direction from the Supreme Court of Colorado, upon October 9, 1917, wherein and whereby said cause in said District Court was dismissed at the costs of this plaintiff in error and the decree of said District Court perpetually enjoining the City and County of Denver and its officers from enforcing said ordinance of said City and County of Denver, number 34 of the Series of 1914, was dissolved, be reversed and set aside, and that a decree by the Supreme Court of the United States be entered declaring said ordinance unconstitutional and void, and perpetually enjoining said City and County of Denver and its officers from enforcing or attempting to enforce the said ordinance number 34 of the Series of 1914, and granting this plaintiff in error such other relief as to said Supreme Court of the United States seems right in the premises, including judgment for costs.

E. N. CLARK,
J. G. McMURRY,

*Attorneys for The Denver and Rio Grande
Railroad Company, Plaintiff in Error to
the United States Supreme Court.*

221½ And the Bond as provided for in the allowance of the said Writ of Error to the Supreme Court of the United States was filed in the Supreme Court of Colorado on October 18, 1917, and is in words and figures as follows, to-wit:

222 In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant in Error.

(Same Case in Trial Court.)

In the District Court of the City and County of Denver, State of Colorado, Division III.

No. 57865.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff.

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Bond.

Know all men by these presents, That The Denver and Rio Grande Railroad Company is held and firmly bound unto the City and County of Denver, State of Colorado, in the sum of one thousand (\$1,000) dollars, to be paid to the said City and County of Denver, State of Colorado, to which payment well and truly
223 to be made, the said The Denver and Rio Grande Railroad Company binds itself firmly by these presents, and as security for such payment, the said The Denver and Rio Grande Railroad Company hereby deposits with the clerk of the District Court of the City and County of Denver, Colorado, the sum of \$1,000.

Sealed with our seals and dated this October 18, 1917.

Whereas, the above named The Denver and Rio Grande Railroad Company seeks as plaintiff in error to prosecute its writs of error from the Supreme Court of the United States to review and reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Colorado, in remitting said cause to the District Court of the City and County of Denver with instructions to dismiss the same, and also to review and reverse the judgment of the said District Court dismissing said cause pursuant to said direction of the Supreme Court of the State of Colorado.

Now, therefore, the condition of this obligation is such, that if the above named The Denver and Rio Grande Railroad Company as plaintiff in error shall prosecute its said writs of error to effect and answer all costs and damages that may be adjudged if it shall fail

to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE DENVER AND RIO GRANDE
RAILROAD COMPANY, (*Principal*),

(Signed) By T. H. MARSHALL, *Treasurer*.

Attest:

(Signed) J. B. ANDREWS,
[SEAL.] *Assistant Secretary*.

Rec'd The \$1,000 deposit provided for in this bond this Oct.
18/17.

(Signed) J. SHERMAN BROWN, *Clerk, etc.*,

(Signed) By CORNELIUS WESTERVELT, *Deputy*.

This Bond approved:

(Signed) S. HARRISON WHITE,
*Chief Justice of the Supreme Court
of the State of Colorado.*

(Signed) CHARLES C. BUTLER,
*Presiding Judge of the District Court
of the City and County of Denver,
Colorado.*

224 And on October 18, 1917, there was filed in the Supreme Court of Colorado the following original Citation and the following original Writ of Error, from the Supreme Court of the United States:

225 Filed in the Supreme Court of the State of Colorado, Oct. 18, 1917. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 8583.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvement of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Plaintiffs in Error,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation, Defendant in Error.

(Same Case in Trial Court.)

In the District Court of the City and County of Denver, State of Colorado, Div. III.

No. 57965.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, and J. M. PERKINS, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, Defendants.

Citation.

THE UNITED STATES OF AMERICA,
State of Colorado, ss:

The President of the United States to City and County of Denver, a Municipal Corporation, and J. M. Perkins, as Commissioner of Social Welfare and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, their respective successors in office, and to James A. Marsh, Attorney for the said City and County of Denver and the said officers:

226 You are hereby respectively cited and admonished to appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Colorado wherein The Denver and Rio Grande Railroad Company is plaintiff in error and the City and County of Denver, et al., are defendants in error, and also pursuant to a writ of error filed in the office of the Clerk of the District Court of the City and County of Denver wherein The Denver and Rio Grande Railroad Company is plaintiff in error and the City and County of Denver, et al., are defendants in error, then and there to show cause, if any there be, why the judgment of the Supreme Court of Colo-

rado, remitting said cause to said District Court with instructions to dismiss the same, and the final judgment of said District Court dismissing said cause upon the Direction of the Supreme Court of Colorado, as in said writs of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Colorado, and the Presiding Judge of the District Court of the City and County of Denver, Colorado, this October 18th, 1917.

S. HARRISON WHITE,

Chief Justice Supreme Court of State of Colorado.

Attest:

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,

Clerk of the Supreme Court of the State of Colorado,

By JAMES PERCHARD,

Deputy Clerk.

CHARLES C. BUTLER,

Presiding Judge of the District Court of the City and County of Denver, Colorado.

Attest:

[SEAL.]

J. SHERMAN BROWN,

Clerk of the District Court of the City and County of Denver, Colo.,

By CORNELIUS WESTERVELT, *Deputy.*

227

Acceptance of Service of Citation.

I, James A. Marsh Attorney for the City and County of Denver and Attorney of Record for each of the persons in the foregoing entitled cases to which this citation is addressed, do hereby acknowledge due and personal service of the above citation, and the receipt of a copy thereof at my office in Denver, Colorado, this October 18th, 1917.

JAMES A. MARSH.

228 Filed in Supreme Court of the State of Colorado Oct. 18, 1917. James R. Killian, Clerk.

Writ of Error.

UNITED STATES OF AMERICA,

State of Colorado, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before

you at the April Term, 1917, thereof, between the City and County of Denver, a municipal corporation, and J. M. Perkins, as Commissioner of Social Welfare, and Mayor of said City and County of Denver, and Clair J. Pitcher, as Commissioner of Finance of said City and County of Denver, and Alexander Nisbet, as Commissioner of Safety of said City and County of Denver, and John B. Hunter, as Commissioner of Improvements of said City and County of Denver, and Otto F. Thum, as Commissioner of Property of said City and County of Denver, plaintiffs in error, against The Denver and Rio Grande Railroad Company, a corporation, defendant in error, No. 8583, a manifest error hath happened, to the great damage of the said The Denver and Rio Grande Railroad Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the Supreme Court of the United States on or before the 17th day of November, 1917, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 18th day of October, in the year of our Lord, one thousand nine hundred and seventeen, and of the Independence of the United States, the one hundred & forty-second year. Issued, at office in the city and county of Denver; in said district, with the seal of the district court of the United States for the district of Colorado, and dated as aforesaid.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk United States District Court,
District of Colorado.

Allowed by

S. HARRISON WHITE,
Chief Justice of the Supreme Court of Colorado.

229

Return.

THE UNITED STATES OF AMERICA,
State of Colorado, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified tran-

script of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the Supreme Court of the State of Colorado, at the city and county of Denver, in said state, this 24th day of October, A. D. 1917.

JAMES R. KILLIAN, *Clerk*,
By JAMES PERCHARD,
Deputy Clerk.

STATE OF COLORADO, ss:

The plaintiff in error having served this writ, by lodging a copy thereof on October 18, 1917, in the clerk's office where the record remains, and having given the security required by law, on the issuing of the citation, within the time required by law, this writ therefore becomes a supersedeas.

In witness whereof, I hereunto subscribe my name, and affix the seal of the Supreme Court of the State of Colorado, at the city and county of Denver, in said state, this 24th day of October, A. D. 1917.

JAMES R. KILLIAN, *Clerk*,
By JAMES PERCHARD,
Deputy Clerk.

[Endorsed:] No. —. The Supreme Court of the United States. The Denver & Rio Grande Railroad Company, Plaintiff in Error, vs. The City and County of Denver et al., Defendants in Error. Writ of Error. — — —, Attorney for Plaintiff in Error.

230 In the Supreme Court of the State of Colorado.

I, James R. Killian, clerk of said Court, do hereby certify that there was lodged and filed with me as such clerk on October 18, 1917, in the matter of the City and County of Denver, et al., vs. The Denver and Rio Grande Railroad Company, Number 8583, the bond, a true copy of which is herein set forth, and I further certify that said foregoing original petition for writ of error to the Supreme Court of The United States, with the allowance thereof, duly endorsed thereon, said original assignments of error, said original citation and said original writ of error, were duly filed in my office on October 18th, 1917, and I further certify that on said October 18th, 1917, there was duly lodged with me as Clerk of said Supreme Court of Colorado, two copies of the said writ of error, as hereinbefore set forth, one for the Defendants in Error, and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said Court, at my office in the City and County of Denver, State of Colorado, this October 24th, 1917.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
*Clerk of the Supreme Court of the
State of Colorado,*
By JAMES PERCHARD,
Deputy Clerk.

Endorsed on cover: File No. 26,268. Colorado Supreme Court. Term No. 801. The Denver & Rio Grande Railroad Company, plaintiff in error, vs. The City and County of Denver et al. File No. 26,269. Colorado, City and County of Denver District Court. Term No. 802. The Denver & Rio Grande Railroad Company, plaintiff in error, vs. The City and County of Denver et al. Filed December 26th, 1917. File Nos. 26,268 and 26,269.



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Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 801.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

PLAINTIFF IN ERROR.

VS.

THE CITY AND COUNTY OF DENVER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF COLORADO.

No. 802.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY AND COUNTY OF DENVER, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE CITY
AND COUNTY OF DENVER, STATE OF
COLORADO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The two cases pending in this Court under Nos. 801 and 802 relate to one matter. One writ of error (Case No. 801) is prosecuted from an opinion and

order of the Supreme Court of the State of Colorado, reversing a judgment of the District Court of the City and County of Denver, and instructing that Court to dismiss the bill for injunction filed by the plaintiff in error, the Denver and Rio Grande Railroad Company. The other writ of error (Case No. 802) is prosecuted from the judgment of the District Court dismissing the bill in obedience to the mandate of the Supreme Court. The two writs bring before this Court the record and opinion and order of the Supreme Court, and the record, findings and judgment of the District Court, and thus present all the facts involved in a complete review of the entire controversy so far as the issues may come within the jurisdiction of this Court.

Plaintiff in error, The Denver and Rio Grande *Railroad* Company, and its predecessor, The Denver and Rio Grande *Railway* Company, will be referred to as the "Railroad," and defendant in error, the City and County of Denver in the State of Colorado, and its predecessor, the City of Denver, will be referred to as the "City."

1. On March 30, 1914, the City Council of the City passed Ordinance No. 34 of the series of 1914, effective May 1, 1914, reciting, in substance, that the City, by various ordinances granted to the Railroad, a right to extend railway tracks along Wynkoop Street and across Seventeenth Street in the City, and that by virtue of said grants the Railroad exercised and is at present exercising said right, and that, in the opinion of the City Council, further maintenance of railroad tracks across Seventeenth Street, at the intersection of Wynkoop Street, has

become an impediment to public travel and greatly retards the general public in its right to use Seventeenth Street, and that the use of the crossing is now wholly unnecessary to the Railroad, and the continuation of such use involves the safety of life and limb of the traveling public. Then follow the three sections of the ordinance, which read as follows:

“Section 1. That Ordinance No. 60 of the series of 1886, and Ordinance No. 9 of the series of 1871, and Ordinance No. 7 of the series of 1886, and Ordinance No. 63 of the series of 1892, and all other ordinances or parts of ordinances be, and the same are hereby repealed, in so far as the same confers any privilege, license, right or rights claimed by or on behalf of the Union Pacific Railway Company and the Denver and Rio Grande Railway Company, to maintain and continue their track or tracks across Seventeenth Street at the point where said Seventeenth Street intersects Wynkoop Street.

Section 2. That it shall be unlawful from and after the passage of this ordinance, and the taking effect thereof, for the said Denver and Rio Grande Railway Company or the said Union Pacific Railway Company, its agents, officers or representatives, to maintain and continue said tracks at the said Seventeenth Street crossing, and that they shall, within thirty days after notice, as herein provided for, remove all tracks heretofore laid by them and now existing on said Seventeenth Street at the crossing aforesaid.

Section 3. That the Commissioner of Improvements shall, upon the taking effect of this ordinance, notify the said Union Pacific Railway Company and the said Denver

and Rio Grande Railway Company to remove all said track or tracks on said street at said crossing, within the time as herein provided, and that, if the said Union Pacific Railway Company and the said Denver and Rio Grande Railway Company shall refuse or neglect to remove said tracks so now maintained by them at and upon said Seventeenth Street at said crossing, then and in that case the Commissioner of Improvements is hereby empowered, authorized and directed to take such means and methods or measures as he may deem proper and necessary to remove all of said track or tracks at said point on Seventeenth Street where the same cross Wynkoop Street" (Record, fol. 34).

2. On March 30, 1914, the Railroad served upon the City a protest, as follows:

"Your protestant, while recognizing the authority of the Council of said City and County to regulate within reason, the use by your protestant of its track on Wynkoop Street at the intersection thereof with Seventeenth Street, in said City and County, respectively denies the authority of the Council of said City and County to remove or require the removal of the track of your protestant at said intersection. Your protestant further declares, as it has heretofore declared, its willingness to submit to reasonable regulation of its use of said track at the intersection of said streets, and its willingness to limit its use thereof to such hours between one o'clock and six o'clock a. m. as shall cause no interference with or inconvenience to the users of said street at said intersection, and prays that the legal and equitable rights of your protestant may be shown that

respect and given that protection to which the rights of citizens and residents of said City and County are lawfully entitled" (fol. 92).

3. At the time this ordinance was passed Wynkoop Street within the boundaries of Seventeenth Street, was occupied by two railroad tracks, one owned and operated by the Union Pacific and one owned and operated by the Railroad.

On May 2, 1914, the Commissioner of Improvements of the City served notice on the Railroad to remove its track in pursuance of this ordinance, within thirty days from that date (fol. 94).

4. On May 26, 1914, the Railroad filed a bill in the District Court of the City and County of Denver, praying injunction against the enforcement of the ordinance (fol. 3). After issue joined, suit was tried and permanent injunction issued restraining the enforcement of the ordinance or interference with the track (fols. 106-110-159).

5. On February 17, 1915, the City filed assignments of error in the Supreme Court of Colorado (fol. 168). After issues were made up and briefs filed, the matter was argued, and the Supreme Court of Colorado reversed the judgment (fols. 171-182) and thereafter denied rehearing (fol. 190), and remanded the case (fol. 191), and judgment of dismissal was entered by the District Court (fol. 173).

6. Thereafter the Railroad filed petition for writs of error to the District Court of the City and County of Denver and to the Supreme Court of the State of Colorado (fols. 194-5, 214-15) and filed as-

signments of error (fols. 196-202-215-221) and sued out of this Court writs of error (fol. 228), and lodged the transcript in this Court (fol. 229), and thereafter citation was issued (fols. 207, 225-6) and writs of error issued by the Clerk of the United States District Court for the District of Colorado (fol. 209).

Statement of the assignments of error will be understood more readily if preceded by a history of the transaction out of which this controversy arose.

The Railroad claims certain right in Wynkoop Street based upon specific grants by Congress of the United States, certain grants by the Legislature of the Territory of Colorado, and certain grants by the City. These grants and the authority of the grantor in each case to make them appear from statutes and ordinances hereafter arranged and set forth.

The Railroad also relies upon certain circumstances and certain acts of the City constituting estoppel against the City. These matters appear under appropriate heads in the following statement of facts.

I. RIGHT ACQUIRED BY THE RAILROAD FROM THE
UNITED STATES.

An Act granting the right of way through the public lands to the Denver and Rio Grande Railway Company. Approved June 8, 1872. 17 U. S. Stats. at Large, 339, provides in part as follows:

“That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public

lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line be, and the same are hereby, granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns; *and all the rights, powers and franchises conferred by the said laws on corporations created under them for constructing and operating railroad and telegraph lines are hereby ratified and confirmed to the above named railway company, its successors and assigns; and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines, are hereby granted to the said company, its successors and assigns, for the extension and operation of its railway and telegraph line in and through any contiguous territory of the United States to the northern boundary line of Mexico."*

It is further provided that like rights, powers and franchises to those conferred upon the Union Pacific Railroad Company by Section 3 of the Act approved July 2, 1864, (13 U. S. Stats. at Large 357), are hereby conferred upon The Denver and Rio Grande Railway Company, its successors and assigns.

Section 3 of the Act referred to, provides that the railroad companies,

“* * * are empowered to enter upon, purchase, take and to hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station houses or any other structure required in the construction and operation of said road.”

An Act of Congress, 18 U. S. Stats. at Large, p. 516, approved March 3, 1875, recites that the conference committee of the Forty-second Congress, relating to the bill granting the right of way to the Denver and Rio Grande Railway Company, recommended that certain words be inserted and that in transcribing the bill these words were not inserted and do not appear in the law, and concludes:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said words above quoted shall be considered and taken as they were intended to be, and they are hereby made a part of said act approved June eighth, eighteen hundred and seventy-two.”

The words referred to are as follows:

“And provided further, That the said Denver and Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privi-

leges, and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed, and legalized as existing from said date of incorporation; but beyond such recognition, ratification, and confirmation of and to said company, this act shall not be construed as affirming or denying the rights of Territories to pass laws for the incorporation of railway companies."

In 1870 The Denver and Rio Grande Railway Company was chartered to build a line "commencing at Denver" (fol. 134).

II. RIGHT ACQUIRED BY THE RAILROAD FROM THE
TERRITORY OF COLORADO.

An Act amendatory of "An Act to provide a temporary government for the Territory of Montana," 14 U. S. Stats. at Large, 426, approved March 2, 1867, provides:

"Sec. 1. That the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits."

An Act amendatory of an Act approved March second, eighteen hundred and sixty-seven, 17 U. S. Stats. at Large 390, approved June 10, 1872, provides:

"That the first section of an Act approved March second, eighteen hundred and sixty-seven, entitled 'An Act amendatory of 'An

Act to provide a temporary government for the Territory of Montana," approved May twenty-sixth, eighteen hundred and sixty-four,' so far as relates to incorporations which have been, or which may hereafter be, created and organized for * * * the construction or operation of railroads * * * under the general incorporation laws of any Territory of the United States, shall be construed as having authorized and as authorizing the legislative assemblies of the territories of the United States, by general incorporation acts, to permit persons to associate together as bodies corporate for purposes above named."

Chapter XVIII of the Revised Statutes of Colorado, 1868, page 115, provides among other things for the incorporation of companies for the purpose of constructing railroads.

The Denver and Rio Grande Railway Company was incorporated October 27, 1870. The articles contain the following: "The route of this railway is described as follows: *Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte River on the southeast side thereof to a point at or near the mouth of Plumb Creek*" (fol. 134).

III. RIGHT ACQUIRED BY THE RAILROAD FROM THE CITY.

Act for relief of the citizens of towns, approved May 23, 1844, 5 U. S. Stats. at Large 657, provides in part as follows:

"That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and

therefore not subject to entry under the existing pre-emption laws, it shall be lawful in case such town or place shall be incorporated for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so settled and occupied, in trust, for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated."

Treaty of Peace with Mexico, February 2, 1848. 9 U. S. Stats. at Large, page 922, by Article V, page 926, so fixes the boundary between the United States and the Republic of Mexico, that the State of Colorado and adjacent territory became a part of the United States.

An Act to provide temporary government for the Territory of Colorado, approved February 28, 1861, 12 U. S. Stats. at Large 172, in Chapter LIX. Section 1 defines the boundaries of the Territory of Colorado and prescribes a temporary government which shall not be construed to "impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe is not, with-

out the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory."

Section 6 vests the legislative power in a legislature and provides that said power shall "extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act; but no law shall be passed interfering with the primary disposal of the soil."

Treaty between the United States of America and the Arapahoe and Cheyenne Indians of the Upper Arkansas River, concluded February 18, 1861, 12 U. S. Stats. at Large 1161, contains the following:

Article 1st. The Arapahoe and Cheyenne tribes of Indians "do hereby cede and relinquish to the United States the lands now owned, possessed or claimed by them, wherever situated, except a tract to be reserved for the use of said tribes located within the following described boundaries." Then follows a description of the territory lying in the southerly portion of Colorado, but not including any part of the land or territory covered by the City of Denver.

Act for relief of citizens of Denver, approved May 28, 1864, 13 U. S. Stats. at Large 94, provides:

"That the provisions of an Act of Congress entitled, 'An Act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances,' approved May twenty-third, eighteen hundred and forty-four, be so extended as to authorize the probate judge of Arapahoe County, in the Territory of Colorado, to enter, at the

minimum price, in trust for the several use and benefit of the rightful occupants of said land and the bona fide owners of the improvements thereon, according to their respective interests, the following legal subdivisions of land, or such portions thereof as are settled and actually occupied for town purposes by the town of Denver." (Description follows.)

Sec. 2. "And be it further enacted, That in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said Act of twenty-third May, eighteen hundred and forty-four, and the rules and regulations of the commissioner of the general land office."

An Act prescribing rules and regulations for the execution of the trust arising under the Act of Congress, entitled, "An Act for the relief of citizens of towns upon lands of the United States under certain circumstances," approved March 11, 1864, Session Laws of Colorado, 1864, page 139, contains the following provisions:

Section 18: "If the title to any such lands shall be vested in any judge, such judge shall convey to the people, or to the legal authorities, the land used or laid out by the town authorities, as streets, lanes, avenues, parks, commons and public grounds, within such time as is herein prescribed for making conveyances to individuals."

Art. XI, Sec. 5, Compiled Laws of Colorado, 1868, p. 619, provides that upon filing plat of city, title to streets shall vest in the city in trust.

The first charter of Denver was granted before Congress passed the Act of 1864 for the relief of

Denver and before the territorial legislature made provision for the execution of the trust created by the Act of Congress.

An Act to incorporate the City of Denver, approved November 7, 1861, General Laws of Colorado, 1861, page 483, contains the following provisions:

Article II creates and describes the City Council.

Article V, page 486, prescribes the powers of the City Council, among which are the following:

“Sec. 9. To open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes and alleys, sidewalks, drains and sewers.

Sec. 16. To provide for enclosing, improving and regulating all public grounds belonging to the city.

Sec. 38. The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, so that such ordinances be not repugnant to, or inconsistent with, the Constitution of the United States, or the organic act of this Territory.”

Article VIII, page 491, contains certain provisions.

“Sec. 7. All property, real and personal, heretofore belonging to the People’s Government of Denver shall be and the same is hereby declared to be vested in the corporation hereby created.”

These provisions indicate the early policy of the Territory toward the City.

An Act to incorporate the City of Denver, approved March 11, 1864, Session Laws of Colorado, 1864, page 170, confers upon the City Council the following powers in addition to those conferred by the Charter of 1861:

Section 3:

Subsection 4th: "To remove all obstructions from the streets, lanes, avenues and alleys of the city, and from the sidewalks and curbstones within the city."

Subsection 5th: "To provide for the construction and repair of all the sidewalks and for cleaning the same, and of the gutters, at the expense of the owners of the ground fronting thereon."

Subsection 6th: "To prevent and remove all encroachments into or upon all or any streets, lanes, avenues or alleys, within the city, established by law or ordinance."

Subsection 8th: "To levy and collect the damages and costs of opening, widening or altering any street, lane, avenue or alley upon the lots or parts of lots, or parcels of ground deemed benefited by the opening, widening or altering of such street, lane, avenue or alley, and upon any of the holders of such lots or parts of lots, or parcels of ground."

This charter was approved the same day the Act of the Legislature was approved by which provision was made for the execution of the trust relating to the townsite.

An Act to reduce the laws incorporating the City of Denver into one Act, General Laws of Colorado, 1866, page 95, contains the powers of the City Council set forth in the Charters of 1861 and 1864. This Charter was in force in 1871 (fols. 152-154).

An Act incorporating the City of Denver, Session Laws of Colorado, 1874, page 255, gives to the City Council power over the streets of the City contained in the Charters of 1861, 1864 and 1866, and adds thereto the following in Article VI, Section 3, sub-paragraph forty-seventh:

“To regulate and prohibit the use of locomotive engines, and require railroad cars to be propelled by other power than that of steam, to direct and control the location of railroad tracks, and to require railroad companies to construct, at their own expense, such bridges, tunnels, or other conveniences at public railroad crossings, as the city council may deem necessary, and to regulate the rates of speed of all railroad trains.”

Powers granted the city by the Act of 1874 (fol. 154), and preceding Acts were preserved and enlarged by the Act of April 6, 1877 (fol. 155), and by the Act of 1878, and by the Act of February 19, 1879, Session Laws of Colorado, 1879, page 199, and by the Act of 1883, Session Laws of Colorado, 1883, page 53, and by the Act of 1885, Session Laws of Colorado, 1885, page 74, and by the Act of 1889, Session Laws of Colorado, 1889, page 124, and by the Act of 1893, Session Laws of Colorado, 1893, page 131.

Though Denver had a special charter, the General Towns and Cities Act of the Legislature of the Territory shows the *policy* of the Territory toward municipal corporations. The following Act was passed two years after Denver received its Charter of 1866 and about six years before Denver received its Charter of 1874.

Chapter 84 of the Revised Statutes of Colorado, 1868, page 602, relates to towns and cities, and provides as follows:

Article VIII, Section 13, page 617: That any city theretofore incorporated by special Act of the Legislative Assembly may, upon petition of two-thirds of the taxable inhabitants thereof, addressed to the county commissioners, be dis-incorporated and may thereafter become incorporated under this Act.

Article II, page 605: A board of trustees shall manage the affairs of the city.

Article III, page 603: The powers of the trustees are set forth, among which are:

“Third: To have and exercise exclusive control over the streets, alleys, avenues and sidewalks of the town.”

“Ninth: To provide for enclosing, improving and protecting the public grounds and cemeteries of the town; and to direct and regulate the planting of ornamental and shade trees in such public grounds, and in the streets and avenues of the town.”

“Thirtieth: To direct and control the laying and construction of railroad tracks, bridges, switches and side tracks, in the

streets, alleys and other public places of the town; to require the same to be so laid and constructed as to interfere as little as possible with the ordinary travel and use of the streets and other public places; to authorize the construction of tramways and horse railways in the town, and to regulate the operation thereof, and the fares to be charged thereon; to require the proprietors of all such railroads and horse-railroads to keep in repair the streets wherein the same may be laid, and to construct and keep in repair, all bridges, culverts, cross-ways, ditches and sewers, which the trustees of the town may deem necessary; to regulate the speed of locomotive engines within the limits of the town."

See Compiled Laws of Colorado, 1868, p. 619, Sec. 5.

Acting under the Charter of 1866, the City passed the following ordinance:

Ordinance of the City of Denver No. 9 of the series of 1871 (fols. 29-32), provides as follows, in substance:

Section 1, grants to The Denver and Rio Grande Railway Company the right of way to "build, operate and maintain their railway through and across certain streets hereafter mentioned with a single or double track."

Section 3. Provides that the right of way shall commence "at a point twelve feet east or left going from Denver south of the center line of the Denver and Pacific Railway track, where said track leaves their depot grounds and enters Wynkoop Street, and running parallel to said Denver and Pacific Railway

track to the north side of G Street; thence continuing the above tangent, which is parallel to the center of Wynkoop Street to or near the established line of Cherry Creek," thence along various streets and courses described to a point where the line shall cross the Congressional grant or south line of Section 33, Township 3 South, Range 68 West of the Sixth Principal Meridian. G Street mentioned above is now Sixteenth Street.

Section 2. Grants the right to build necessary depots, turnouts, turntables, water tanks and side tracks on land owned or that may be acquired by the company, and in the construction thereof to use the alleys and streets of the city.

Section 4. Defines the location of the second track if it shall be built.

Section 5. Provides that the railroad shall conform to the grade of the street.

Sections 6 and 7, provide for maintenance of culverts and planking at street crossings.

Section 8. Provides that the company, in order to lay its track without incurring too heavy a grade, may be permitted to cut the banks of Cherry Creek.

Section 9. Provides that the company shall provide piles at Cherry Creek to protect the banks of the creek against floods.

Section 10. Provides for the second track across Cherry Creek.

Section 11. Provides for the change in the grade of the railroad to correspond with the change of the grade of the streets.

Section 12. Refers to changing culverts and planking to correspond with changed grade.

Section 13. Grants the company the right to use horse, steam or other motive power in the operation of the railway, but limits the speed to five miles per hour. Approved by the Mayor on June 1, 1871.

The Railroad was constructed under this ordinance prior to August 1, 1871 (fol. 85).

By ordinance of January 22, 1875, the City confirmed the rights of way and other privileges heretofore granted to railroad and other corporations in the City of Denver, as follows: "That all the rights and privileges granted to the respective corporations and persons mentioned in the following ordinances heretofore passed by the City Council of the City of Denver, and all the obligations, liabilities and requirements therein provided for are hereby continued and confirmed." Then follows an enumeration of the ordinances, among which appears the ordinance granting the right of way to The Denver and Rio Grande Railroad Company over and across certain streets in the City of Denver (fols. 82 and 142).

On January 10, 1878, the City passed an ordinance known as No. 1 of the series of 1878, providing: "that in addition to the privileges heretofore given to The Denver and Rio Grande Railroad Company, with respect to the use of certain streets in said City, the said Company is hereby granted" certain other street privileges (fols. 82 and 142).

In 1878 the City codified and revised the ordinances and included in the revision and codification, as Chapter 28 thereof, the ordinance of January 22, 1875 (fols. 82 and 143).

On January 19, 1886, the City passed an ordinance known as No. 7 of the series of 1886, granting certain rights of way in the streets of the City to The Denver and Rio Grande Railroad Company. Section 2 thereof provides:

“Sec. 2. The rights, privileges or franchises declared in or by this ordinance are also expressly declared to be supplementary to an ordinance enacted by the City Council of the City of Denver and approved heretofore, to-wit, on the first day of June, A. D. 1871, reference to which is heretofore made in the next preceding section; and the rights and privileges hereby granted, and the exercise of the same, are made expressly subject to all and singular the agreements and conditions in said ordinance contained, bearing date of approval as aforesaid, to-wit, June 15, A. D. 1871, so far as the same are or may be applicable thereto” (fols. 83 and 143).

On November 30, 1912, the City passed Ordinance 185 of the series of 1912, entitled: “An Ordinance requiring railroad companies maintaining tracks in Wynkoop Street, between Cherry Creek and Nineteenth Street, to pave at their own expense, that portion of Wynkoop Street lying between the rails of the tracks so maintained and two feet on the outside of each rail, and to keep the pavement in repair thereafter (fols. 83 and 144-5).

Then follows Sections 1 and 2 which require the Railroad as one of the occupants of Wynkoop Street, to do the paving specified (fol. 84).

That the City had full knowledge of and acquiesced in the use and occupation of Wynkoop Street by the Railroad for a period of more than forty years, is distinctly shown (fol. 86).

By Ordinance No. 34 of the series of 1914, the City undertook to repeal all ordinances and licenses theretofore granted to the City to the Railroad, and in specifying the rights intended to be revoked the City recites that the City or its predecessor by various ordinances specified, granted to the Railroad a right to extend tracks along Wynkoop Street and across Seventeenth Street, and that the Railroad, by virtue of said grants, has exercised and is now exercising the rights and privileges referred to, thereby specifically recognizing said ordinances (fol. 90).

For full text of the ordinance of 1914, see opening statement, page 3.

W. SUCCESSION OF INTERESTS.

1. Plaintiff in error succeeded to all the rights of The Denver and Rio Grande Railway Company, and at the time Ordinance 34 of the series of 1914 was passed, was in the full exercise and enjoyment of all rights theretofore granted to that company, or to its successors.

Findings of fact numbers seven and eight (fols. 75-6-7).

2. Defendant in error is the legal successor to all the rights of the municipal corporation known as the City of Denver and mentioned in the several statutes and ordinances granting powers to said City, or by which the said City granted powers and franchises to other parties, and upon the date of the passage of Ordinance 34 of the series of 1914, was in the full enjoyment of all rights and powers theretofore granted to its predecessors, and was likewise bound by all duties, obligations and limitations theretofore imposed by statutes, or ordinances or contracts upon it and its predecessors.

Finding of fact number two (fol. 66).

V. NATURE AND EXTENT OF USE OF THE STREET BY THE
RAILROAD.

The original grant to the Railroad was by Ordinance 9 of the series of 1871, which was accepted by the Railroad and acted upon in good faith, and prior to the 1st day of August, 1871, the track was constructed and put in operation along Wynkoop Street, across Seventeenth Street to Nineteenth Street (fol. 74).

This track was laid for the purpose of operating to and from the depot of the Kansas Pacific Railway Company, which was located at Nineteenth and Wynkoop Streets in the City of Denver, and was used as a main line track for the purpose of reaching said depot, until about the year 1881, on or about which date the Union Depot was constructed at the foot of Seventeenth Street and was reached by the Railroad by another route (fol. 85). After the construction

of the Union Depot the track was used for the handling of loaded and empty cars to and from the various shippers situated on Wynkoop Street between Seventeenth and Nineteenth Streets (fol. 87). These shippers are dealers in mining and electrical machinery, mill supplies and hardware, lumber and paint, groceries, and grain, flour and feed (fol. 87).

At various times up to 1892, other tracks were constructed in Wynkoop Street and used as industrial spurs, none of which, however, crossed Seventeenth Street. These spurs were constructed under ordinances granting to the Railroad the right to construct tracks and recognizing, confirming and ratifying the right of the Railroad to maintain the track previously built under the Ordinance of 1871 (fol. 86). The business done over said track for a period of several years immediately prior to 1914 amounted to about 850 cars of freight per year (fol. 88). The average annual revenue derived by the Railroad from other carriers for switching services was \$1,500 to \$2,000. The Railroad would be obliged to pay to other carriers for switching services \$1,000 to \$1,500 per year in case the tracks in question were broken at Seventeenth Street (fol. 89).

From 1871 to 1881 the track was used as a part of main line; from 1881 to 1914 it was used as a means and facility for serving industries on Wynkoop Street. At all times the track was used as and constituted a part of an interstate railway system, all of which was obvious to and well known to the City (fol. 86).

VI. NECESSITY FOR REGULATION.

The Railroad recognizes the right of the City to regulate the use of Wynkoop Street at its intersection with Seventeenth Street so far as the Railroad operation is concerned, and offered to limit the use of its track to such hours between one o'clock and six o'clock a. m. as shall cause no interference with other users of the streets (fol. 92).

The crossing at Seventeenth and Wynkoop Streets is used wholly by persons going to and coming from the Union Depot. The average number of persons using said crossing each day is between 1,500 and 2,500. The switching of cars at said street intersection produces only that inconvenience which unavoidably follows delay to persons and vehicles thereat (fol. 149).

An ordinance of the City authorizes the Mayor and City Council to require steam railroad companies operating within the corporate limits of the City, to place flagmen, gates, automatic crossing bells or other safety appliances at railroad crossings over streets, and the said City ordinance leaves it to the discretion of the Mayor and City Council to designate the places where such safeguards should be provided and maintained. No such requirements have ever been made at the intersection of Wynkoop and Seventeenth Streets (fol. 149).

Exhibit following folio 94 shows that no train is scheduled to arrive at or depart from the Union Depot between twelve o'clock midnight and six o'clock a. m. excepting a single train on the Santa

Fe Railroad, which is scheduled to depart from said station at 3:50 a. m. The same fact is shown on Exhibit A (fol. 151).

Assuming 850 cars (fol. 88) per year and assuming each car moved over Seventeenth Street crossing twice, in one direction under load and in the other direction empty, this would be 1,700 cars total per year, or less than 5 cars per day, requiring not to exceed 5 or 10 minutes per day. That this use could be confined to hours when no trains are scheduled to arrive or depart from the Union Station is illustrated by the following ordinances of the City:

“Ordinance No. 5, series 1915. Whereas, In the opinion of the Council the *general use* of the railroad and railway tracks on Wynkoop Street, crossing Sixteenth Street and Seventeenth Street in the City and County of Denver, interferes with and constitutes an impediment to public travel at, over and across the said crossings, and greatly retards the general public in its right to use the said Sixteenth and Seventeenth Street crossings where the same intersect Wynkoop Street; and

Whereas, In the opinion of the Council, the *general use* of the railroad and railway tracks on Wynkoop Street, at, over or across the aforesaid Sixteenth Street and Seventeenth Street crossings where the said Sixteenth and Seventeenth Streets intersect said Wynkoop Street, endangers the safety of life and limb of the traveling public whose business necessitates their crossing over said crossing during their egress to or ingress from said City and County of Denver.

Section 1. It shall be unlawful for any railroad or railway company, or any person, firm, corporation or association, owning or operating a railway or railroad within the City and County of Denver, or any of their officers, agents or employes, *to make use of* the railroad or railway tracks, or any of them, lying on Wynkoop Street, at or over the street crossings at Seventeenth Street and Sixteenth Street, where the same intersect Wynkoop Street, at any time of the day or night other than the period herein prescribed, to-wit: At any time other than between the hours of twelve o'clock midnight and three o'clock a. m.

Section 2. That it shall be unlawful for any railroad or railway company, or any person, firm, corporation or association, owning or operating a railway or railroad within the City and County of Denver, or any of their officers, agents or employes, to permit or cause said crossings to be used at any other time of the day or night other than between the hours of twelve o'clock midnight and three o'clock a. m., by any engine, locomotive, car, train, or other vehicle or vehicles running upon or along any of such railway or railroad tracks which lie, or may lie, upon and along said Wynkoop Street; Provided, however, This Ordinance shall not be considered to apply to the use or operation of any electrically operated street railway lawfully using, or granted the right to use, said Wynkoop Street at any time, in connection with its general street railway system operating in, upon and over various streets of the City and County of Denver under a franchise, or franchises, lawfully granted for said purpose.

Penalty for violation, \$50 to \$300—passed January 18, 1915.

Ordinance No. 77, series of 1916. Section 1. It shall be unlawful for any railroad or railway company, or any person, firm, corporation or association, owning or operating a railway or railroad within the City and County of Denver, or any of its officers, agents or employees, to make use of the railroad or railway tracks, or any of them, lying on Wynkoop Street, at or over the street crossing at Seventeenth Street, where the same intersects Wynkoop Street, at any time of the day or night other than the period herein prescribed, to-wit: At any time other than between the hours of twelve o'clock midnight and three o'clock a. m."

VII. RESULT OF TAKING UP TRACK.

Reference to the map at folio 122, shows that taking up the track at Seventeenth Street will break the continuity of the railroad running from Cherry Creek east to Nineteenth Street, and will leave that portion of the tracks of the Railroad lying east of Seventeenth Street without direct physical connection with the system of tracks of the Railroad which lies west of Cherry Creek.

The business along Wynkoop Street east of Seventeenth Street and west of Nineteenth Street is competitive. The Union Pacific Railroad has trackage in that street with which there is connection with the general system of the Union Pacific at Nineteenth Street, the Union Pacific is thus enabled to handle business originating on Wynkoop Street in the blocks between Seventeenth and Nineteenth.

The Railroad, however, is so located in these blocks that it has the only access to industries located on the southerly side of Wynkoop Street from Seventeenth Street to the middle of the block between Eighteenth and Nineteenth Streets. It is manifest that the Railroad enjoys some advantage over its rival the Union Pacific in that locality. The chief industries are located on the southerly side of Wynkoop Street between Seventeenth and Nineteenth Streets. It is manifest, therefore, that taking up of the track at Seventeenth Street will deprive the Railroad of any participation in the business on Wynkoop Street east of Seventeenth Street, and that removing this track will inure to the benefit of the Union Pacific by turning to that Company all of the business previously handled by the Railroad.

Moreover, much of the business originating at or destined to industries on Wynkoop Street between Seventeenth and Nineteenth Streets tributary to the Railroad, is destined to or comes from points on the Rio Grande Railroad in Colorado or west. There will be no connection between the Railroad and the Union Pacific Systems when the tracks are broken at Seventeenth Street, except by a circuitous route through the Union Station (fol. 128).

The transfer of this business through Union Station will involve delay and will also incur additional expense, as it will be necessary to pay the Union Pacific or other lines for a switch service in the transfer to the point of connection with the Railroad (fol. 129).

The circuitous and unsatisfactory arrangement is described at folio 130.

While the number of industries located on Wynkoop Street, between Seventeenth and Nineteenth Streets, is comparatively small, they are industries of considerable importance, handling large tonnage of essential commodities (fol. 146).

The transfer of this business to the Union Pacific will entail not only the loss of revenue which the Railroad now collects as switching charges from other lines, but will compel the Railroad to pay other lines for switching services which is now unnecessary or which is performed by the Railroad on its own account, and for which it makes no charge to the shippers (fols. 148-149).

VIII. SUMMARY OF FACTS SHOWN IN THE HISTORY OF
THE OCCUPATION OF THE STREET.

a. The lands embraced in the original townsite of the City became subject to the laws of the United States applicable to the public domain about 1861 by cancellation of the existing Indian treaty applicable thereto.

b. Provision for the entry of lands for the townsite of the City was made by Act of Congress of 1864 and the lands were entered in 1865.

c. The Act of Congress of 1864, by reference to the Act of 1844, vested in the Territorial Legislature of Colorado power to prescribe the details of administration of the townsite of the City. The Territorial Legislature in 1864 and 1868 made pro-

vision whereby the title to the streets of the City vested in the municipal corporation for the use and benefit of the public.

d. The Territorial Legislature retained full control over the streets of the City, except in so far as it granted the control to the City.

e. The grant by the Territorial Legislature, in force in 1871, conferred upon the City general control of the use and occupation of the streets and public places within the City, but gave no *specific* power as to railroads.

f. The City, in 1871, granted to the Railroad the right to use and occupy Wynkoop Street at its intersection with Seventeenth Street in the City, and after the powers of the City were augmented in 1874, the City ratified, confirmed and supplemented the original grant to the Railroad.

g. Congress of the United States authorized the Legislature of the Territory of Colorado to provide general incorporation laws and the Legislature passed such laws in 1867.

h. The Railroad was incorporated in 1871 to build a line of railroad *commencing at Denver*, which, by interpretation, included authority to build from a point within the City along some available route.

i. Congress granted to the Railroad a right of way over the public lands, *commencing at Denver*, which grant likewise, by interpretation, means from a point within the City.

j. The Railroad was built over the route described in the Act of Congress and in the articles of incorporation and was located in Wynkoop Street, across Seventeenth Street in the City.

k. After all the facts above stated had transpired, Congress of the United States ratified and confirmed the incorporation of the Railroad.

l. The City acquiesced in the use by the Railroad and caused the Railroad to expend money in building track and required it to pave Wynkoop Street at the expense of the Railroad.

m. Within two years after the City had compelled the Railroad to spend large sums of money in paving the street, the City passed an ordinance revoking all grants of right and requiring the removal of all tracks.

Upon these facts the District Court held the ordinance of 1914 revoking all rights of the Railroad and requiring removal of the track illegal and void and entered judgment enjoining the City from interfering with the Railroad (fol. 159).

Upon these facts the matter was presented to the Supreme Court of Colorado and that Court rendered the opinion for the reversal of which this case is brought to this Court.

IX. OPINION OF THE SUPREME COURT OF COLORADO.

The opinion presents the following points:

A. The City has power to remove the track, "without regard to the character of the right upon which it was first established and maintained" (fol. 178).

B. The track has ceased to be used as a main line and the Railroad has access to a new terminal

station over another route and the industries served by the track could be served by other tracks (fol. 179).

C. Although no unusual inconvenience results from the track and its use the track is, nevertheless, "a continuing nuisance and a menace" (fol. 180).

D. Although the "evil" may be mitigated, nothing but removal will eradicate it (fol. 180).

E. Balancing the interests of the general public against the interests of the industries served by the track, which industries may be otherwise served, shows that the ordinance is "eminently reasonable" (fol. 181).

This opinion may be reduced to these essential elements:

First. It makes no difference whence the title or right was acquired, nor what consideration was paid for it, nor by what contract it is surrounded, the municipal authority may destroy it by exercise of the police power.

Second. Although it is possible or practicable to regulate the use of property and thereby minimize evil consequences to the public, the municipality may, nevertheless, destroy the property in an exercise of the police power.

Third. The reasonableness of an exercise of the police power may be determined wholly with reference to the public on the one hand and patrons of the Railroad on the other without direct reference to the interests of the Railroad itself.

Upon this record and upon the opinion of the Supreme Court and the judgment of the District Court of Colorado the Railroad assigns the several errors upon which it relies for a reversal of the opinion and judgment of the Colorado Courts.

X. ASSIGNMENTS OF ERROR.

First. The opinion and judgment are erroneous because they are based upon the proposition that the police power of the City is not limited or affected in any way or to any degree by any statute of Congress, or by any statute of the Legislature of the Territory of Colorado, or by any ordinance of the City granting rights to the Railroad (fols. 178 and 216).

Second. The opinion and judgment are erroneous because the ordinance of the City not only prohibits the Railroad from operating trains over the track, but attempts to revoke all license and right to maintain said track in the street and thereby deprives the Railroad of its physical property in the street without due process of law and likewise and as a result or incident of the destruction of the physical property, deprives the Railroad of its right to collect fares and charges for transportation over and along Wynkoop Street and thereby destroys the franchise rights of the Railroad without due process of law and without just compensation, in violation of Article V, Section 1, of the amendment to the Constitution of the United States (fol. 217).

Third. That the opinion and judgment operating as recited in paragraph second above, deprive the Railroad of its property, both tangible and in-

tangible without due process of law and contrary to the provisions of Article XIV, paragraph 1 of the amendment to the Constitution of the United States (fol. 218).

Fourth: That the opinion and judgment operating as recited in paragraph second above, abrogate and impair the contract under which the Railroad occupied the street and violate Article I, Section 10, of the Constitution of the United States (fol. 18).

Fifth. That the opinion and judgment operating as recited in paragraph second above, permit and authorize the City to break a line of railroad engaged in interstate commerce and to impede and interfere with interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States, and are contrary to the Act of Congress of the United States, approved February 4, 1887, 24 Stats. at Large 379, and the various acts amendatory thereof and supplemental thereto (fols. 218-19).

Sixth. The opinion and judgment are erroneous in that they are based upon a finding that the maintenance of the railroad track in Wynkoop Street is a "continuing nuisance and a menace," there being no testimony upon which such finding could be legally made (fols. 180 and 219).

Seventh. The opinion and judgment are erroneous in that the propriety and reasonableness of the ordinance is tested by possible and speculative uses to which the street, at the point in question, may be devoted in future arising from change in train schedules, although there is no evidence that such uses are probable (fols. 179-80 and 219-20).

Eighth. The opinion and judgment are erroneous in that the reasonableness of the ordinance is tested by wholly irrelevant matters as to whether the Railroad can reach the new Union Station over some other route and whether the industries on Seventeenth Street may be served by some other carrier (fols. 179 and 220).

Ninth. The opinion and judgment are erroneous in that they hold that the ordinance which destroys the railroad property is valid, although there is no showing that regulation short of destruction would not be sufficient (fols. 220-21).

ARGUMENT.

I. EXERCISE OF THE POLICE POWER BY THE CITY WAS
LIMITED BY THE CHARTER AND OTHER RIGHT
OF THE RAILROAD.

The Supreme Court of Colorado in its opinion in this case says:

“The duty of government agents to prohibit whatever may be harmful to the public, or to secure such economic and social conditions as a complex civilization may require, carries with it the power to remove the track, *without regard to the character of the right upon which it was first established and maintained*” (fol. 178).

This statement is made perhaps in answer to a finding by the trial court that, the Railroad “had the lawful right to occupy” the street (fol. 106) and that:

“* * * by the passage of the ordinance referred to in the eighth paragraph hereof, and by all the facts and circumstances occurring after the City had become vested with the power to grant such right of way, the City should be, and is, estopped to deny plaintiff’s right to retain its track on Wynkoop Street at its intersection with Seventeenth Street” (fol. 158).

The Supreme Court recited the contention that the Railroad occupied the street under franchise and contract right and that the City was estopped to deny the right. It also recited the contention of the City, that there was no legal grant of franchise or right, and that the City in the exercise of the police power could compel removal of the track, even if there were such right (fol. 177).

It is manifest that the Supreme Court declined to consider the question whether or not the Railroad had any right in the street, and declined to occupy itself with a definition of right, and was of the opinion that no matter what right the Railroad acquired, and no matter how the right was acquired, and no matter what the character and history of the Railroad occupation for forty years was, and no matter what the acts of the City in respect to that occupation were, the City had the authority under the police power to remove the track. The Supreme Court, therefore, refused to consider the testimony as to the several grants, federal, territorial and municipal, and refused to consider the evidence as to estoppel of the City.

Because of the right of the Railroad in the streets and because of the estoppel of the City, the trial Court held that the City could not by exercise of the police power compel the removal of the track and entered judgment restraining the City. The Supreme Court did not reverse the trial Court in these findings, but said these things are of no consequence, and no matter whether these findings are correct or erroneous, the City has the right to compel the removal of the track. The Supreme Court, therefore, ordered the trial Court to enter judgment "without regard to the character of the right upon which it (the track) was first established and maintained" (fols. 178-182).

The only qualification which the Supreme Court admits is that the exercise of the police power shall be reasonable. It is manifest that an ordinance

might be within itself reasonable, but might impair a contract and thus become invalid because of a violation of the Constitution. If the constitutional prohibition against the impairment of contracts could only be invoked in cases where the exercise of the police power is unreasonable, the Constitutional prohibition becomes wholly unnecessary.

The constitutional prohibition is independent ground for condemning the exercise of the police power; it is not a ground which must co-exist with unreasonableness or some other defect.

It is manifest that the opinion of the Supreme Court of Colorado is fundamentally erroneous. It appears also that inasmuch as that Court ignored and by its order compelled the trial Court to disregard the right of the Railroad and refused to apply or to permit the trial Court to apply the doctrine of estoppel, the case must be sent back with a mandate to correct the error, or this Court must examine the record to determine whether or not the evidence will, in any event, support the contention of the Railroad that it had contract or other right of a character protected by the constitutional prohibitions, and that the conduct of the City estopped the City to deny or revoke the right of the Railroad. Assuming that this Court may look to the record and determine whether or not the Supreme Court of Colorado could have found that the Railroad had a contract right and that the City was estopped to deny the right, it becomes necessary to analyze the facts and authorities bearing upon that phase of the controversy.

It is not always possible to lay hand to a written grant of right, not even possible in some instances to classify a right under any recognized description of property, yet the right may receive as full protection under the constitutional guarantees as though it were capable of the plainest definition.

In the present instance it is not necessary to base the right of the Railroad upon the acts of the City alone, nor to base it upon the Acts of the Legislature of the Territory of Colorado alone, nor to base it upon the Acts of Congress of the United States alone. The right rests upon all and is the result of co-operation of these three governmental forces.

Nor is it necessary to reduce the right to a definite written or published grant. It may rest upon a specific grant supplemented by general provisions of legislation, or it may rest in whole or in part in principles of equity and public policy.

In the present instance the right of the Railroad lies in:

(a) Grant of right of way by Congress of the United States.

(b) Grant of right and franchise by the Legislature of the Territory of Colorado.

(c) Confirmation by Congress of the United States of the franchise and corporate rights granted by the Territorial Legislature.

(d) Specific grant by the City.

(e) Confirmation and ratification of specific grant by the City.

(f) A course of conduct and dealing on the part of the City estopping the City to deny the right of the Railroad.

The specific statutes, ordinances and formal Acts are set forth in detail in the foregoing statement of the case. The Act of Congress granted a right of way to the Railroad. The incorporation Acts of the Territorial Legislature authorized the filing of articles of incorporation describing the line of the Railroad, and the articles filed in pursuance of that provision of the statute, described the railroad "*commencing at the City of Denver.*" The Act of Congress granting the right of way, and ratify- and confirming the incorporation of the Railroad was passed with full knowledge on the part of Congress of that description of the line or route of the railroad.

1. *A charter describing a line of railroad commencing at the City, by implication, includes the right to reach some convenient point within the City.*

The act of Congress as well as the charter of the Railroad are just as effective to authorize the building of a track of the Railroad along Wynkoop Street across Seventeenth Street to the Kansas Pacific station at Nineteenth and Wynkoop Streets as if the act of Congress and charter of the Railroad had specifically provided that the track should begin at the station and traverse Wynkoop Street.

In *Union Pacific Railroad Co. v. Hall*, 91 U. S. 343, this Court says, at page 348:

“Instances are not rare in which statutes have been construed, not literally, but in accordance with the common use of the language employed by the law makers. Authority to construct a railroad or turnpike from A to B, or beginning at A and running to B, is held to confer authority to commence the road at some point within A and to end it at some point within B. The words ‘from,’ ‘to’ and ‘at’ are taken inclusively, according to the subject matter.”

In *Rio Grande Railroad Co. v. City of Brownsville*, 45 Tex. 88, the Court says, at page 93:

“* * * the authority conferred on appellant by its charter to construct a railroad and telegraph to Brownsville does not fix the terminus of its road at the limits or boundary line of the city, but imports an authority to extend the road within its corporate limits.”

In *Commonwealth v. The Erie and Northeast Railroad Co.*, 27 Pa. St. 339, the Court says at page 352:

“The act of incorporation authorizes the defendants to build a railroad ‘from the borough of Erie to some point on the east boundary of the township of North East.’ The defendants’ counsel insist that the word *from* should be taken inclusively, and that a road from any part of the borough to the proposed *terminus ad quem* is a compliance with the law. On the other hand, the counsel for the plaintiff insist that it must begin at the borough line, and not elsewhere. Our opinion is with the defendants on this point * * *”

The Court continues at pages 354-5:

“The right of a company, therefore, to build a railroad on the street of a city depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words, there can be no dispute about it. It may also be given by implication; for instance, if a company be authorized to make a railroad, by a straight line, between two designated points, this implies the right to run upon, along or across all the streets or roads which lie in the course of such line. So also when an act of incorporation directs a road to be made between certain termini, by such route as the grantees of the privilege shall think best, it may be located on an intervening street or other common highway, if in the judgment of the directors it be necessary or expedient to do so.”

The rule stated applies to a charter under a general incorporation law.

Mason v. Brooklyn etc. Railroad Co., 35 Barb. 373 at 377-8.

Central of Georgia Railroad Co. v. Union Springs etc. Co., 144 Ala. 639 at 646.

In *St. Louis etc. Railroad Co. v. Hannibal Depot Co.*, 125 Mo. 82, the Court says at pages 90 and 91:

“It is insisted in the first place that the power to construct a railroad from the city of Hannibal to another designated point in the state does not sufficiently designate the terminal point in said city and consequently no power existed, under the charter of plaintiff, to extend its road through a part of the city

to the *union depot*. The charter contains no restrictions, express or implied, as to the point or terminus in the city of Hannibal. To or from a city, without other restrictions, we think fairly means to and from any point within such city. So far as the state is concerned the grant to plaintiff confers power to locate one of the termini of its road at any point in the city of Hannibal."

In *Mason v. Brooklyn Railroad Co.*, 35 Barb. 373, the Court says at 377 and 378:

"The 3d article states the object of the company to be 'to construct a railroad with its appurtenances, to commence in the city of Brooklyn at some convenient point, and to terminate at Newtown, Queens County; the railroad to be located in Kings and Queens counties, and its length to be about twenty-five miles.' It is contended that the word 'at' means at the limit or boundary of, and that one terminus of the road is thus located, by these articles themselves, at the boundary of the town of Newtown, which is also the boundary of the city of Brooklyn, and would restrict the road wholly to that city. Such a construction might be given to the language in question, but it also susceptible of a different, and, to say the least, of a not less natural one. The residue of the instrument, as well as surrounding circumstances, may be called in to aid in construing its phraseology. * * * The natural interpretation of this language certainly is, that the road is to be built into Newtown, and that it is to pass through the two counties named in reaching from the one terminus, in Brooklyn, to the other, in Newtown."

In *Hazelhurst, Receiver v. Freeman*, 52 Ga. 244, the Court says at page 245:

“This case turns entirely upon the construction of the charter of the Macon and Brunswick Railroad Company. It is by that charter authorized to construct and maintain a railroad from Brunswick to the city of Macon.”

And at page 446:

“‘From’ and ‘to’ do not have a precise, fixed meaning, but may mean from within, and into. With this understanding of the words of the charter, let us now inquire into the probable meaning of the legislature in the use of them. The great object of the legislature, in the charter of this road, was to get another route from the interior to the seaboard. Can it be supposed that it was contemplated that the road should stop at the limits of the city of Brunswick, or that it should not connect with the connecting roads at Macon?”

And at page 447:

“It is a fair rule of construction to say that the company has, by its charter, such rights as are necessary to make the express rights granted it effective. With no right to enter within the limits of the two cities which it was the object of the charter to connect, the right to run the road would be seriously hampered.”

2. *The Railroad received right in Wynkoop Street from the United States.*

After the treaty of peace with Mexico in 1848, 9 U. S. Stats. at Large, 922, and after the abrogation of the treaty with the Arapahoe and Cheyenne Indians in 1861, 12 U. S. Stats. at Large 1163, the United States had complete dominion over the lands upon which the City is located, and full power over the inhabitants of the Territory of Colorado except as it may have parted with such right by the Act of February 28, 1861, 12 U. S. Stats. at Large, 172, by which Congress provided a temporary government for the new Territory then created. Among the powers possessed by Congress were:

a. Power to grant right of way over public lands.

The power to grant right of way over public domain is an incident to the government proprietorship. The Act approved March 3, 1875, 18 U. S. Stats. at Large, 482, is an example of the general exercise of that power, and there were numerous specific grants from time to time.

b. Power to incorporate railroad companies.

Congress exercised the power to grant franchises to railroads in many instances, one of which was the grant in 1862 to the Union Pacific Railroad Company, 12 U. S. Stats. at Large, 489. This power received sanction in:

Pacific Railroad Removal Cases, 115 U. S. 1, 14, 18.

California v. Central Pacific Railroad Co., 127 U. S. 1, 39.

Cherokee Nation v. Southern Kansas Railway Co., 135 U. S. 641, 658.

Luxton v. North River Bridge Co., 153 U. S. 525, 529.

Central Pacific Railroad Co. v. California, 162 U. S. 91, 118-19.

So. Pac. Ry. v. United States, 183 U. S. 519, 527.

Wilson v. Shaw, 204 U. S. 24, 33.

c. Power to authorize territorial legislatures to grant franchises to railroad companies, and power to ratify things done under acts of the territorial legislature.

Congress, having general power as sovereign to incorporate railroad companies and grant franchises, could authorize an agent to perform that function and could ratify the acts of the agent.

National Bank v. County of Yankton, 101 U. S. 129, 133.

Murphy v. Ramsey, 114 U. S. 15, 44-45.

Scott v. Sandford, 19 How. (U. S.) 393, 440.

Hornbuckle v. Toombs, 18 Wall. (U. S.) 648, 655.

In *Adams Express Company v. Denver and Rio Grande Railway Company*, 16 Fed. 712, the character of territorial legislation is thus defined at page 715:

“Territorial statutes have a distinct and well defined character of their own. The people of a territory, when authorized to form a territorial government, are vested with a qualified sovereignty. Congress may

limit their powers, and may annul their enactments, but, subject to these limitations, the territory is a government."

The Court said, at page 716:

"It is, however, further insisted that the respondent, The Denver and Rio Grande Railway Company, derives certain rights and exercises certain powers by virtue of an act of Congress, and that, therefore, it may be sued in this Court. The respondent, * * * was chartered by the territory of Colorado, but an act of Congress was passed granting to it the right of way over public domain. This act of Congress does not purport to create a corporation, but only to grant to an existing corporation certain rights. The respondent, the Railway Company, is not a common carrier by virtue of the act of Congress, but by virtue of its charter granted by the legislature of Colorado."

And at page 717:

"The respondent is a common carrier by virtue of its charter, and its charter is an act of the territorial legislature of Colorado."

If Congress had power to appoint an agent it certainly had power to ratify the acts of the agent, and if the grant of power to the agent were not complete, or if the exercise of the power by the agent was not in conformity to the grant of power by Congress, it was within the powers of Congress to make the act valid. Such act became valid either as a ratified act or as an original act of Congress.

Wilson v. Shaw, 204 U. S. 24, 32.

Mittingly v. District of Columbia, 97 U. S. 687, 692.

Congress by the Act of March 2, 1864, 14 U. S. Stats. at Large, 426, gave the Legislature of the Territory of Colorado power to incorporate companies for mining, manufacturing and other industrial purposes, and by the Act of June 10, 1872, 17 U. S. Stats. at Large, 390, provided that the acts of Congress, May 1864, 13 Stats. at Large, 8, and the Act of March 1867, shall be construed as having authorized the Legislature of the territory, to permit incorporation of companies to construct and operate railroads.

The Legislature of the Territory of Colorado, Revised Statutes of Colorado, 1868, page 115, provided for the incorporation of railroad companies and required the filing of a certificate with the Secretary of the Territory.

The Denver and Rio Grande Railway Company was incorporated October 27, 1870, under the provisions of this Act. The Railroad having been chartered in 1870, received the benefit of the general ratification Act of 1872.

The charter of the Railroad described the line of road "commencing at the City of Denver" and continuing in a southerly direction over the route described. The description of the line by necessary implication, authorized the corporation to complete a road to a connection with the existing railroad terminating at a station located at Nineteenth and Wynkoop Streets in the City of Denver. The Legislature of the Territory of Colorado had at that time dominion over the townsite of Denver except as it may have limited its dominion by a grant of power

to the City, and it exercised all the powers remaining in it. If any part of its powers and dominion had been delegated to the City such delegated powers were exercised by the City as will appear hereafter.

Congress exercised its power to grant a right of way, by the Act of June 8, 1872, 17 U. S. Stats. at Large 339, by which Congress granted to the Railroad a right of way over the public domain. The Act itself does not describe the line of the road. It has been the practice for railroad companies to which government grants of rights of way have been given to locate the road either by preliminary surveys or by construction, and after such location is completed the map, field notes and other data are filed with the Secretary of the Interior and the line thereby becomes fixed and the grant effective.

Congress also by the Act of June 8, 1872, 17 U. S. Stats at Large 339, and by the Act of March 3, 1875, 18 Stats. at Large 516, ratified and confirmed from the date of its incorporation the charter granted to the Railroad.

The ratification and confirmation by Congress was with full knowledge of the location of the Railroad. In *Railway Co. v. Alling*, 99 U. S. 463, the history of the Company is recited and at pages 474 and 475 this Court said:

“Of what the company had done prior to the passage of the Act of 1872, towards effecting the objects of its incorporation, Congress, it is fairly to be presumed, was not uninformed; it was aware, we must also presume, of the routes designated in the charter of the company, for the main road and its several

branches, all so connected as to constitute, when completed, an extended railway system for that entire region. That Congress was so informed is quite clearly indicated by the terms employed in the Act of 1872. The act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and branches."

It must result, therefore, that Congress exercised to the limit its powers in behalf of the Railroad.

If Congress at the time it passed the grant and ratification in 1872 and the ratification of 1875 had not parted with its powers, its acts were in execution of those powers. On the other hand if it had passed its powers or some of them to the Legislature of the Territory of Colorado the Legislature exercised the delegated power in behalf of the Railroad as will appear hereafter. The acts of Congress ratifying the incorporation of the Railroad under the act of the Legislature of the Territory of Colorado, if not valid as a ratification was valid as an original exercise of power.

3. *The Railroad received charter rights from the Legislature of the Territory of Colorado.*

As pointed out Congress authorized the Legislature of the Territory to grant charters to corporations by general incorporation laws, and the Legislature exercised the power and the Railroad was chartered.

Congress by the Act of May 23, 1844, 5 U. S. Stats. at Large 657, and by the Supplemental Act of May 28, 1864, 13 U. S. Stats. at Large 94, gave the territorial Legislature full power over the Denver townsite as a whole.

The paramount and dominant control of the streets, was in the Legislature.

3 Dillon Municipal Corporations (5th Ed.),
Sec. 1122.

State of Florida v. Jacksonville Railroad
Co., 29 Fla. 590, 603.

United Railroad Co. v. Jersey City, 71 N. J.
L. 80, 81.

In *Denver Circle R. Co. v. Nestor*, 10 Colo. 403,
at page 417, it is held:

“The weight of authority is to the effect that when the fee of a street is in the municipality in trust for the public for street purposes, the paramount control thereof is in the legislature as the representative of the public, and the municipality may apply them to such uses as are authorized by the statute. In the absence of legislation on the subject, the municipal government may appropriate the streets to the ordinary purposes of business and travel.”

Congress, also, by the organic act creating the Territory of Colorado, February 28, 1861, 12 U. S. Stats. at Large 172, gave to the territorial legislature powers in said act enumerated.

It follows that the territorial Legislature, with the assent of Congress, had the power to authorize the building of a railroad in a street of a city, and

could directly exercise that power without the consent of the municipality unless the territorial Legislature made consent of the city necessary.

Joyce on Franchises, Sec. 141.

Missouri River Telephone Co. v. City of Mitchell, 22 S. D. 191.

Water Co. v. City of Rochester, 176 N. Y. 36, 50.

Borough of Millvale v. Evergreen Railway Co., 131 Pa. St. 1, 22.

Harrison v. New Orleans Railway Co., 34 La. Ann. 462, 464-5.

Elliott on Roads and Streets (3d Ed.), Sec. 935.

4. *The Railroad received a grant from the City.*

Dominion of the City over the streets, so far as such dominion existed proceeds from two lines of legislation.

The Act of March 11, 1864, Session Laws of Colorado 1864, page 139, provides that title to the lands covered by the townsite vest in the probate judge and that title to all land used or laid out for public streets or public grounds vest in the City without conveyance from the probate judge.

Title to the streets in the City, therefore, vested in the municipal corporation in trust for the public.

City of Denver v. Kent, 1 Colo. 336, 340, 342, 343-4.

Cofield v. McClellan, 1 Colo. 370, 372-3.

Whitsett v. Union Depot Co., 10 Colo. 243, 244.

It is probably true, however, that this was a naked trust and did not vest in the municipal corporation power to deal with the streets other than as it might be necessary to protect the title. If by virtue of this trust the City acquired any power to determine the use of the streets such power was authority for the subsequent acts of the City dealing with the Railroad.

The Legislature of the Territory of Colorado granted to the City a charter, November 7, 1861, General Laws of Colo. 1861, by which the City council is given power to "open, alter, widen, extend, establish, grade, pave or otherwise improve and keep in repair streets"; to provide for improving all public grounds belonging to the City, and to pass ordinances "which shall be necessary and proper for carrying into execution the powers specified in this act so that such ordinances be not repugnant to, or inconsistent, with the Constitution of the United States or the organic act of this Territory." By Article VIII, page 491, the City council was further empowered to keep the streets in repair and by Section 7 of Article VIII, it is declared that,

"all property, real and personal, heretofore belonging to the government of Denver shall be and the same is hereby declared to be vested in the corporation hereby created."

The Legislature of the Territory amended that charter by Act of March 11, 1864, Session Laws of Colorado 1864, page 170. Among the powers given to the City council by the new charter are the following: Subsection 1 of Section 3: To provide for

the improving and regulating of all public grounds belonging to the City; Subsection 4: To remove all obstructions from the streets of the City. Subsection 5: To provide for the construction and repair of sidewalks. Subsection 6: To prevent and remove all encroachments into or upon streets. Subsection 8: To levy and collect damages and costs for opening, widening or altering streets.

This charter was again amended by the Act of April 10, 1865, General Laws of Colorado 1865, page 109, but alterations do not affect the questions here involved.

By Act of 1866, General Laws of Colorado 1866, page 95, the charter was reduced to a single act but the powers set forth in the preceding charters were not changed in any respect pertinent to this case.

It was under the charter powers enumerated, the City existed at the time the Railroad was built.

In pursuance of the powers possessed by the City by reason of the trust established by the acts of Congress and by reason of the act of the Legislature of the Territory of Colorado, and by reason of the specific grants of power from the Legislature of the Territory, the City passed ordinance No. 9 of the series of 1871, granting to the Railroad right to occupy Wynkoop Street.

It is manifest that the City assumed that it had the power to grant the right to the Railroad and undertook to exercise that power in the passage of the ordinance. The ordinance does not purport to grant exclusive right, it does not purport to grant perpetual right and the duration of the right need

not now be determined, for at any rate the grant runs for the corporate life of the Railroad which is fifty years from October, 1870 (fol. 112). There were no reservations in this grant and none may be implied that would give the City the right to revoke at will.

The City either had the power to grant the right to the Railroad or did not have the power. If it had the power it was duly exercised. If it did not have the power, the power remained in the territorial Legislature and was exercised by the Legislature as already pointed out, or if it did not lodge in the Legislature of the Territory it remained in Congress and was exercised as already shown.

If it be considered that it was necessary for the Railroad to obtain permission from the City there are persuasive arguments for the conclusion that the City had power to make the grant of 1871.

a. The powers specifically given to the City are broad enough to cover railroad occupation of streets.

Building a railroad in the street would undoubtedly disturb the surface of the street and render repairs necessary. Bringing materials upon the street preparatory to building track would present obstructions to travel upon the street. The council had power to remove the obstructions. Workmen engaged in laying track and shifting material and preparing a track for railroad operation would constitute an encroachment upon the street. The council had power to prevent encroachments. These are matters over which the council had *specific* power and control. Does the power to prevent imply the power to permit?

The charter is a grant of power to do certain things. It is not a command to do those things. The language used is "the City council shall have power," to do the things enumerated, not, the City council *shall* do the things enumerated.

The grant of power may be paraphrased as follows:

"The city council shall have power to remove obstructions from the streets and to prevent encroachments upon the streets, whenever, in the judgment or discretion of the city council, it is necessary for the best interest of the public to do so."

If this be the meaning of the charter, the City council, in exercise of judgment and discretion, had the implied power to permit as well as prevent.

b. Power should be implied.

Building a railroad in the street and operating trains was at the time a needed and much desired improvement. The City was in 1866 without railroad transportation. The policy of the Federal government to encourage railroad building is part of the history of the United States. The grants to the Union Pacific Railroad and to numerous other western railroads, on liberal terms, indicate urgent public demand.

The territorial Legislature likewise encouraged railroad building and authorized cities and counties to subscribe to stocks and bonds of proposed railroads.

The general Towns and Cities Act of 1868 of the Legislature of Colorado, gave municipal corporations organized under the act specified, power to "direct and compel the laying and construction of railroad tracks, bridges, switches, and sidetracks in the streets." Statutes of Colorado 1868, Chapter 84, page 602.

Every town in the Territory of Colorado had specific power to permit the use of streets for railroad purposes, unless it be held that Denver had not such power because it was organized and existed under a special charter. Denver was the largest settlement in the Territory in 1868. The Kansas-Pacific Railroad reached the City prior to 1871, and The Denver and Rio Grande Railway was projected to connect with that road at Denver and extend into the mountains as far as Canon City (fols. 85 and 135). Denver was the principal City in the Territory that had immediate prospects of railroad facilities.

To hold that the City had no power to permit the Railroad to occupy a street, amounts to saying that the City which had the best prospect of obtaining railroad facilities had not the power to permit laying the track, while all the towns which had no such prospects had full power to admit railroads. It is a principle of law that power upon the part of a city to do or to permit the doing of certain things may be inferred from the circumstances.

Dillon on Municipal Corporations, (5th Ed.), Vol. 3, Sec. 1233.

“The legislative authority to railroad companies to occupy the streets of an incorporated place, although it must exist to warrant the action, need not be expressly conferred but may be given by necessary implication.”

c. The City received specific power and ratified previous grant to the Railroad.

But if the right was not given by the ordinance of 1871 and it still remained necessary for the Railroad to receive sanction from the City, the subsequent acts of the City granted the right.

The Act approved February 13, 1874, Session Laws of Colorado 1874, page 255, at 269, granted to the City Council power as follows:

“47th. To regulate and prohibit the use of locomotive engines * * * to direct and control the location of railroad tracks.”

Denver Circle Railroad Co. v. Nestor, 10 Colo. 403, 419-20.

Following this grant of power the City passed an ordinance on January 22, 1875, entitled:

“An Ordinance confirming the rights of way and other privileges heretofore granted to railroads and other corporations, in the City of Denver.”

Among the ordinances specified is the ordinance entitled:

“An Ordinance granting right of way to the Denver and Rio Grande Railway Company, through and across certain streets in the City of Denver.”

The ordinance provides as follows with respect to these rights of way:

“That all the rights and privileges granted to the respective corporations and the persons mentioned in the following ordinances heretofore passed by the City Council of the City of Denver and all the obligations, liabilities and requirements therein provided for, are hereby continued and confirmed” (fol. 80).

In 1878 the City Council passed an ordinance providing:

“That in addition to the privileges heretofore given to the Denver and Rio Grande Railway Company in respect to the use of certain streets in said City, the Company is hereby granted” certain other privileges (fols. 82, 83 and 143).

It thus appears that after the City received specific authority to deal with railroad occupation of streets, the City affirmed and continued the rights and privileges granted by the ordinance of 1871. Even if the City was without specific or implied power to pass the ordinance of 1871, the Act of the City in 1875 amounts to an original grant of the privileges covered by the ordinance of 1871.

5. By its conduct in relation to the Railroad and the occupation of the street, the City is estopped to deny the right of the Railroad.

If the City had no power to grant the right, it had no power to interfere with the Charter granted by the Legislature of the Territory and ratified by Congress. It is not reasonable to assume that the City had no power to grant the right, but did have full power to prevent any other governmental agency

from granting the right. When the City was given full powers in 1874 it was not given specific power to deal with pre-existing conditions, that is, it was given no specific power to cancel any rights then enjoyed by the Railroad in the streets of the City. The Legislature of the Territory in 1874 could not have violated the charter rights of the Railroad which the Legislature had conferred, and it follows therefore that the Legislature could not authorize the City to violate such contract. In other words, it is not conceivable that the Territorial Legislature sought to give the City an option with regard to rights previously granted by the Legislature to the Railroad when the Legislature had no option.

Rochester Water Company v. City of
Rochester, 176 N. Y. 36 at 47.

It may be, therefore, that the City was not called upon, following the supplemental grant of power of 1874 to take any action with reference to railroad occupation of streets. If, however, it was contemplated that the City should take action, everything done by the City, thereafter, amounts to acquiescence in what had already been done by the Legislature of the Territory and by Congress, and the action of the City estops the City to deny the rights of the Railroad.

The history of the Railroad in Wynkoop Street from 1870 to the date of the trial of the suit is contained in the findings of the trial Court Nos. 11 (fol. 86) and 12 (fols. 87-89) and has been sufficiently set forth in the statement of the case. The law applicable to these facts is suggested in the following citations.

In *The Board of County Commissioners of Arapahoe County v. The City of Denver*, 30 Colo. 13 at 15-16, the Supreme Court of Colorado says:

“The defense of equitable estoppel may be asserted against a municipal corporation when the character of the action and the facts and circumstances are such that justice and equity demand that the corporation should be estopped.”

In *the City of Sacramento v. Southern Pacific Railway Company*, 127 Cal. 217 at 222, the Court says:

“There is nothing so sacred about a municipality that an estoppel may not be raised against it by its acts. In equity and in good conscience, it, like individuals, is bound to treat its neighbors fairly.”

The author of *Dillon on Municipal Corporations* (5th Ed.), at Section 1191, says:

“In the exercise of proper diligence the public authorities may prevent encroachments upon public streets, and if they do not, any citizen may take the necessary steps to do so; and if there is not only a failure to act by either, but affirmative action with the apparent approval of every one interested, and the situation is charged by permanent improvements being made, the principles of equity require that the public should be estopped.”

In *the City of Colorado Springs v. The Colorado and Southern Railway Company*, 38 Colo. 107, a company constructed and maintained for eighteen years main tracks and sidings and turnouts in a street and kept the crossings in good condition, so

that the same could be used by the public. The ordinance under which the company claimed the right to maintain the tracks, authorized the construction and operation of a railroad with a single or double track and all necessary turnouts and switches. In an action to compel the removal of the tracks, the city claimed the use was not authorized. The Court says at pages 112 to 114:

“The construction we have put upon the ordinance is one which appellant has placed upon it for about eighteen years.

All of the tracks in question had been down and in use a number of years before the institution of this action, and some of them as long as eighteen years before its bringing; further, important industries have sprung up along this section of street, whose location has doubtless been influenced by the trackage facilities there, for so many years enjoyed by defendant; in fact, for many years all parties have, by their acts, construed the ordinance in question as we have—that is, that it authorized the presence of the system of tracks complained of.

The right to lay a track through a street implies, by necessary implication, the right to use such track in the mode ordinarily adopted by railroad companies, and subject to reasonable regulation under the police power of the proper authorities. The right to lay side tracks and turnouts, in like manner, implies the right to use them, and the only use which could be reasonably contemplated by their construction is for the transportation of goods to and from the adjoining stores and warehouses. Add to this the significant fact that the railroad company after being placed in

possession of its franchise, construed it to confer this right, and exercised it uniformly, without complaint or interruption, for between 17 and 18 years. A contemporaneous construction of a law is of very high authority. The practical exercise of a right under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction thus established by years of uniform usage, is often allowed by the courts, even in doubtful cases, to have the force of settled law."

In *City of New York v. New York City Ry. Co.*, 193 N. Y. 543, 86 N. E. 565, the Court says at pages 548 and 549:

"Under these circumstances the practical construction of the parties by a uniform course of conduct under all administrations of the city government for more than forty years is of controlling importance."

The doctrine of estoppel is also applied by this court in *Louisville v. Cumberland Tel. Co.*, 224 U. S. 649, at page 662:

"With the knowledge and acquiescence of the city, and in reliance on the statutory conveyances of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city (*Boone County v. Burlington & M. R. R.*, 139 U. S. 684), from claiming that the ordinance was inoperative, and it also prevented the council from denying that the

Cumberland Company has succeeded to every right and obligation of the Ohio Valley Company."

In *City of Seattle v. Columbia, etc., R. R. Co. et al.*, 6 Wash. 379, the Court says at page 387:

"The city undertook to and did, so far as it was able, confer this privilege on the respondents; its acts have never been in any wise questioned, excepting in this instance, where it undertakes to set up its own want of power. But it sought to exercise the power, and its right so to do was not interfered with by any higher authority, but, on the contrary, was subsequently confirmed; and we are of the opinion that the city is in no position to urge the invalidity of the franchise, or its want of power to grant the same, under the circumstances, nor can it arbitrarily repeal the same, whatever rights it may have in the exercise of the power of eminent domain."

In *Chicago, Rock Island and Pacific Railroad Company v. City of Joliet*, 79 Ill. 25, it was contended that the city was not estopped to deny a grant of right in a city street. Overruling the argument the Court said at pages 40-41:

"By the action of the city, the company had the right to repose, in security, upon the belief that it had acquired a valid right of way over the public grounds, and that it would ever be suffered to enjoy the same undisturbed in the right by any interference against it on the part of the city. By the ordinance * * * the company was encouraged to build its depot where it did, and where it could not be made use of without the track of the road running across the public square.

The road had then but just gone into operation and had the city, at that time, instead of recognizing the company's right of way over the public grounds, and granting increased facilities for the exercises of it, denied the right, or made objection to its exercise, the company might have then changed its line."

In *People v. City of Rock Island*, 215 Ill. 488, the Court says at page 495:

"It has frequently been decided that the doctrine of estoppel *in pais* is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. They may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. * * * Permanent improvements and great expenditures have been made which would not have been made but for the positive action of the city and its officers, and to compel the abandonment of the premises for use as depot grounds would be contrary to natural justice."

Before leaving this phase of the case it may be helpful to call attention to the distinction between a franchise and a license. In *McPhee & McGinnity Co. v. Union Pacific Railroad Company*, 158 Fed. 5, the charter of the City of Denver provided that no *franchise* relating to any street shall be granted except upon a vote of the taxpayers. The charter further provided that the city council might grant a li-

cense or permit to use the streets of the city. A right was granted by the council without a vote of the citizens and the question was whether the right granted was a franchise requiring the sanction of the voters or was a license which the city council had power to give. At page 10 the Court says:

“A franchise is a right or privilege granted by the sovereignty to one or more persons to do some act or acts which they could not perform without this grant from the sovereign power. * * * In this country the title of every lawful franchise is deraigned from the Nation or the State and the City of Denver had no power to grant any franchise which the Constitution and the laws of the State of Colorado had not authorized it to give. * * * A right or privilege which is essential to the performance of the general functions of the purposes of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city water works or gas works, and to collect tolls therefor, is a franchise. * * * A right or privilege not essential to the general function or purpose of a grant, and of such a nature that a private party may grant a like right or privilege upon his property, such as a temporary or revocable permission to occupy or use a portion of some public ground, highway or street, is a license and not a franchise.”

The Court says, at page 11:

“The privilege which is the subject of this litigation is limited and local, and it was not indispensable to the general object or the

performance of the main function of the Union Pacific Company. It could maintain and operate its railroad into and through the City of Denver as well without as with the right and particularly its spur track upon Blake Street, and this privilege seems to be a license rather than a franchise."

The right to build the spur track was granted about 1907. The Union Pacific Railroad or its predecessor had operated into the City of Denver a main line more than twenty-five years prior to 1907. It is evident, therefore, that this piece of track was not in contemplation when the original franchise of the Company was granted by Congress and could not therefore have constituted any part of the original grant and could not be held to be an essential to the corporate efficiency of that company.

In the case now before the Court it appears that when the Railroad was chartered under the Act of the Legislature of the Territory of Colorado, there existed in Denver at Nineteenth and Wynkoop Streets a railroad station, terminus of the Kansas Pacific Railroad. The purpose of chartering the new company was that it might connect its track at this station with the existing line of road extending from Denver to the Missouri River (Finding of Fact No. 11, fol. 85). It was necessary, therefore, that the projected road should reach this station and unless it reached this station it could not perform the functions for which it was incorporated and for which its charter was granted. It follows, therefore, that the right to run along Wynkoop Street to the station was essential to the corporation and was therefore a charter right.

II. UNDER CONSTITUTIONAL PROHIBITIONS THE CITY
COULD NOT ENFORCE THE ORDINANCE OF 1914.

In the preceding discussion the charter of the Railroad and the right to occupy the street and the conduct of the several governments and governmental agencies, National, Territorial, State and Municipal relating to the occupation of the street are pointed out. It remains to consider what protection the Constitution throws around rights so acquired.

1. The constitutional prohibitions against the impairment of contracts and against the taking of property without due process of law extend to intangible property and to contracts resting either in writing or in parol or arising through implication of law or equity.

That franchise, contract and property rights are protected under Article I, Section 10, of the Constitution of the United States and under Article XIV, paragraph 1, of the Amendments to the Constitution, and Article V, Section 1, of the Amendments to the Constitution, is too well established to warrant argument.

Dartmouth College v. Woodward, 4
Wheat. 517 at 710.

City of Louisville v. Cumberland Telephone Co., 224 U. S. 649, 661.

Grand Trunk Railway Co. v. City of South Bend, 227 U. S. 544, 553.

Chicago, etc., Railway Co. v. State of Wisconsin, 238 U. S. 491, 502.

The rights acquired under the circumstances and in the manner described in the preceding discussion come within the description of contracts and property contemplated by the constitutional provisions. Some illustrations drawn from decided cases are here collected.

In *Muhlker v. New York & Harlem Railroad Company*, 197 U. S. 544, it appears that plaintiff became owner, in 1888, of a certain lot in the City of New York abutting on a duly established street of that city. Pursuant to an Act of the Legislature of New York passed in 1892, an elevated railroad structure was completed in the street in front of the property in 1896. Plaintiff brought suit in 1897 for damages to his lot and premises resulting from interference with light, air and access, due to the elevated railroad structure. He recovered judgment in the trial Court and the judgment was affirmed in the Appellate Division of the Supreme Court, but was reversed by the Court of Appeals and the complaint dismissed. Whereupon the case was brought to this Court.

At page 560, this Court points out that the Courts of New York had held that interference with light, air and access, under conditions present in this case, amount to a taking of property, for which the abutting owner is entitled to recover damages, and that the trial Court and Appellate Division of the Supreme Court followed these decisions in rendering and sustaining the judgment in favor of plaintiff, but that "in this case there is a complete change of ruling by the Court of Appeals."

And at 570 the Court refers to the previous decisions of the Court of Appeals of New York, and says:

“When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation. * * *

We are not called upon to discuss the power or limitations upon the power, of the Courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States.

* * * This is a truism; and where there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantages between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate.”

In the case now before the Court there appear repeated acts of the City granting rights to the Railroad in Wynkoop Street, and supplementing, extending, ratifying, confirming and otherwise recognizing the right of the Railroad to maintain its track in that street.

The acts of the City construing, ratifying, approving and holding valid the right of the Railroad to occupy the street, culminating in 1912 in an ordinance requiring the Railroad, because of its occupancy of the street, to expend a large sum of money in the betterment of the roadway.

In less than a year and a half after this recognition and the imposition of this expense, the City reversed all of its previous actions and declares the Railroad has no right in the street and must immediately and without remuneration of any kind get out of the street.

Under the doctrine of the case last cited it should be held that the action and conduct on the part of the City constituted a contract with the Railroad, under which the Railroad expended money, and improved not only its own property, but the property of the City, and that the contract could not be arbitrarily broken and set aside. If a property owner in a city has a right to rely upon judicial decisions as to his rights in the street upon which his property abuts, has not one who occupies the street the right to rely upon the decisions and solemn acts of the municipality in respect to the right under which he may continue to occupy the street?

In *Denver Tramway Co. v. Londoner*, 20 Colo. 150, it appeared that a Street Railway Company relying upon an ordinance of the City of Denver and upon the active consent and co-operation of the city, expended a large sum of money planting poles and making other preparations for the installation of a railway system. The city with full knowledge of

the expenditure and preparations made by the Company, permitted the work to proceed until large expenses had been incurred, and then undertook to revoke all license, franchise and right of the Company to construct the railroad. The Supreme Court of Colorado passing upon that case said, at page 157:

“Under such circumstances, it was manifestly unjust for the executive officers of the city to treat the plaintiff company or its employes as trespassers for proceeding with the work of constructing the electric line of plaintiff company through the streets of the city already occupied for that purpose. The company had expended large sums of money in a great public enterprise; it had done this upon the faith of the express action of the city authorities. The use of the streets for such purpose had received legislative sanction, that is, such use had been made lawful when supplemented by municipal consent. The city had recognized such use as lawful and had specifically provided the way and means whereby the plaintiff company should proceed with its work in constructing its electric lines, so that even though the original grant of authority may have been in excess of the chartered powers of the city, still the executive officers of the city could not, while such municipal consent remained unrevoked, justly deny the right of the plaintiff company to complete the work already begun, nor treat its employees as trespassers for prosecuting such work under the circumstances.”

That decision was rendered in 1894, twenty years before the present case arose. Had not the Railroad the right to anticipate that the Supreme Court of this State would adhere to that doctrine?

Had not the Railroad the right to assume that the improvements it made in the street, the expenses which it had incurred, and that its occupation of the street were in all respects the equivalent of similar elements presented in the case last cited, and that the Supreme Court would protect the Railroad in its right to the occupation of the street.

In *Grand Trunk Western Railway Company v. City of South Bend*, 227 U. S. 544, it appears that the State of Indiana granted, in 1866, to the predecessor of the plaintiff railroad company authority to build a railroad between certain termini, and that the City of South Bend, in 1866, passed an ordinance granting to the Company the right to lay a double track railroad along a certain street in the city. A single track was built in 1871 and operated until 1901, when the railroad company prepared to build a second track. The city passed an ordinance in 1901 repealing the ordinance of 1866 and the mayor of the city ordered the railroad company to desist from building the track. The railroad company filed a bill for injunction and the city demurred to the bill, and the Supreme Court of Indiana sustained a judgment dismissing the bill (174 Ind. 230), and the matters being brought to this Court, the city contended:

a. The police power is an inalienable power of sovereignty.

b. No matter what the license was, the repealing ordinance is a valid exercise of the police power (page 549).

This Court said, at page 557:

“Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon became an irrevocable contract, and the city is powerless to set it aside.” Citing *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 103.

The Court, referring to the fact that the Legislature of Indiana authorized the construction of the road, subject, however, to the consent of the city, referred to the argument on behalf of the city that its consent was subject to withdrawal at any time the city saw fit, and said that it would be an extraordinary result if, under the circumstances the State could not withdraw from the railroad the authority given to build without thereby violating the Constitution of the United States, and yet the city could withdraw its consent and thereby nullify the authority granted by the Legislature and indirectly impair the contract. Quoting at page 558 from *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, at 402, this Court says:

“* * * such a contract ordinance ‘does not in the least restrict the legislative powers of the city except, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot in the exercise of its legislative power impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the State which created the corporation, by its most solemn acts, has no such power.’ ”

In *Houston and Texas Central Railway Company v. Texas*, 170 U. S. 243, it appears that by various acts of the Legislature of the State of Texas, lands were granted in aid of railroad construction. That in pursuance of those acts certain railroad companies built lines and proceeded to comply with the statutes and earn the lands granted. In 1869 the Constitution of the State was changed in such manner as to prohibit the Legislature from granting lands to any persons other than settlers and in parcels exceeding 160 acres. The State thereafter undertook to prevent a certain railroad company from asserting title to certain lands covered by a grant to that company, which grant antedated the amendment to the Constitution.

The case found its way to this Court and at page 255, Chief Justice Fuller remarked that the Legislature by this grant of land secured the construction of a certain railroad which was an obvious necessity, especially in view of the fact that it served the State Capital, which was at the time without railroad transportation, and that the grant constituted a contract between the State and the Company, and says at page 261:

“It follows that Section 6 of Article X of the Constitution of Texas as given effect by the State Courts impairs the obligation of the contract and deprives the company of its property without due process of law.”

In *Dobbins v. Los Angeles*, 195 U. S. 223, the City of Los Angeles, by ordinance defined the district within which gas plants might be erected and

operated. The plaintiff, relying upon the ordinance, purchased a site and began the construction of a gas plant within the district designated by the city as territory within which that industry could be conducted.

After the enterprise was started and expenditures had been made, the city passed another ordinance changing the boundaries of the district in such manner as to throw the site of the proposed plant wholly outside the permitted area, thereby rendering it unlawful for the plaintiff to complete the enterprise. The plaintiff brought suit alleging that the action of the city amounted to the taking of property without due process of law in violation of the Constitution. A demurrer to the complaint was sustained by the trial court, and the Supreme Court of California upheld that decision, and the case found its way to this Court. At page 241, this Court says:

“In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution.”

In this case, the only vested property right the plaintiff had was such as accrued out of the fact that she had been led to believe that it was safe to build

a plant at the particular place. There is nothing to show that she had been persuaded or induced to make the investment, but merely that the action of the city in defining the open territory justified her belief that she would not be interfered with in the construction and operation of the proposed plant.

In the present case the Railroad, for over forty years, was not merely permitted and authorized, but was encouraged to use the street in question.

In *Southern Pacific Company v. City of Portland*, 227 U. S. 559, in respect to the power of a city to revoke a grant, this Court says, at page 573:

“Even if the city could have contracted for the right to revoke the state’s franchise, the council did not attempt to reserve a power to repeal, but only that it might make and alter regulations, and Ordinance 16491, whether treated as an exercise of the general police or special reserve power, recognized that the carrier might use electricity to haul passenger cars. There is nothing in that ordinance or in this record which indicates that there is any difference in result in the operation of the two classes of cars, or that the company has less right to haul one than the other. The lessee, and its assignors, as common carriers were charged with the duty of operating both, and Ordinance 599 in permitting a railway track to be laid in Fourth Street expressly authorized cars to be run thereon. Manifestly that gave the right to the company to transport freight as well as passengers. But if the city can prohibit the company from operating one set of cars it can prevent the use of the other, and under the power to regulate it could thus defeat the

franchise granted by the State of Oregon and impair the contract under which the tracks were located and on the faith of which the terminals were constructed."

In the case now before the Court there was no reservation in either the charter of the Railroad or in the ordinance of the City.

2. The provision of the Constitution of the United States with reference to interstate commerce (Art. I, Sec. 8) does not rest upon property rights but upon the status of the transportation agency.

The Constitution does not provide that the Federal control of interstate commerce and facilities does not apply when individual property rights may be affected, nor does it provide that these facilities may be interfered with or regulated upon one interstate route if there is another route of interstate commerce available, nor does it provide that spur tracks or incidental facilities may be interfered with provided the main artery of interstate commerce is not disturbed. All facilities for conducting interstate commerce are protected.

In *St. Louis and San Francisco Railway Co. v. Seale*, 229 U. S. 156, this Court says, at page 161:

"Whether they (cars in transit) were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."

In *Illinois Central R. R. v. Illinois*, 163 U. S. 142, at page 154, this Court says:

“But the state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.”

The track involved in this case is a facility for interstate traffic, and the removal of a part of it necessarily impairs its usefulness for such traffic.

In *Grand Trunk Railway Co. v. City of South Bend*, 227 U. S. 544, at 556, this Court says:

“This franchise was single and specific, and when accepted and acted upon became binding—not foot by foot, as the rails were laid—but as an entirety.”

In *City of Chicago v. Union Stock Yards Co.*, 164 Ill. 224, at 234, the Court says:

“The breaking of the continuity of the line by the removal of the tracks from the street crossings would, of course, destroy the substantial value of the road,—at least of that part of it lying east of the Chicago, Rock Island and Pacific Railroad,—and would, so far as we can see, impose on appellant a great and unnecessary loss.”

In *Kansas City So. Ry. Co. v. Kaw Valley Drainage District*, 233 U. S. 75; the facts were: The Kansas river flowed through the district and overflowed its banks, causing great loss; the railroad company owned the bridges over that river which caused it to overflow; the drainage district, in pursuance of the power given it by the state, ordered the company to raise the bridges to specified heights.

The company refused to do so. Thereupon the district filed a petition for mandamus. The company answered setting up that its tracks over the bridges were used in interstate commerce which would be cut off and destroyed by the enforcement of the order. The state Court issued the writ. The United States Supreme Court reversed the state Court and in so doing says, at page 78:

“These judgments must be taken as they read upon their face * * * They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the states. But that subject matter is under the exclusive control of Congress and is not one that it has left to the states until there shall be further action on its part. The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ.”

The Court says further, at page 79:

“The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. * * * To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarine, or the export of natural gas. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527. *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. Rep. 757. *West v. Kansas N. G. Co.*, 221 U. S. 229, 262, 55 L.

Ed. 716, 729, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564. Furthermore in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other States, but merely that it would be helped by raising them. The fact that the Court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass."

In *Louisville and Nashville Ry. v. Central Stockyards Co.*, 212 U. S. 133, at page 139, it appears that the Constitution of Kentucky required that every railroad company doing business in that State shall receive, deliver and transport all freight without discrimination as to service or charge,

"* * * and shall so receive, deliver, transfer and transport said freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies."

The Louisville and Nashville Railroad Company made the Bourbon Stock Yards upon its tracks in Louisville its depot for stock deliveries in that city. The Southern Railway Company made the Central Stock Yards on its tracks its point of receiving and delivering of livestock in said city. There was a track connection between the two systems of railroad located between the two stock yards. The owners of the Central Yards sought to compel the Louisville and Nashville Railroad to deliver livestock to their yards through the track connection of the Southern

Railroad and invoked the provisions of the Constitution of the State. The Appellate Court of the State sustained a judgment and decree by which

“the Railroad Company (Louisville and Nashville) was required whenever requested by the consignor, consignee, or owner of the stock, at any of the stations, * * * ‘to recognize their right to change the destination and * * *’ the railroad was required to change the destination and deliver at the point of connection with the Southern Railway tracks for delivery by the latter to the Central Stock Yards.”

The general question was duly presented whether the Constitution of Kentucky, interpreted as compelling an interstate carrier to change the routing of a shipment and to so make delivery as to deprive the carrier of the use of its own facilities and equipment in the transportation and delivery of interstate shipments, was a violation of the Constitution of the United States and this Court held that it was a violation. Citing *McNeill v. Southern Railway Company*, 202 U. S. 543.

If it is illegal for state authorities to order a carrier to forego the use of its own facilities and to send interstate commerce over the tracks of another and rival carrier it must be equally illegal for the state authorities to order a carrier to take up a portion of its track, the result of which will be to compel that carrier to forego the use of a portion of its facilities and to turn over interstate business to another and rival carrier for transportation over the tracks of such carrier.

With respect to interference with commerce, this Court says in *Grand Trunk Railway Co. v. City of South Bend*, 227 U. S. 544, at page 556:

“If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the State’s grant and command to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commerce, similar in their nature to the street itself. Such consequences, though improbable, are rendered impossible by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a State, whether acting through a General Assembly or a municipality exercising delegated legislative power.”

III. THE ORDINANCE IS AN UNREASONABLE EXERCISE OF
THE POLICE POWER.

The ordinance destroys a railroad track, and, consequently prohibits and renders impossible the operation of a line of railroad. It is not, therefore, an ordinance regulating the use, but is an ordinance prohibiting and destroying the use. The Supreme Court of Colorado says that this use of the track itself must be destroyed; that regulation would only mitigate but would not eradicate the “evil.” This proposition involves the assumption that eradication

is necessary or desirable. That assumption is based primarily upon the further declaration of the Court that the railroad is a "nuisance and menace."

If the railroad is not a nuisance, or if there is not sufficient evidence in the record upon which the Court may find that it is a nuisance, or if the nuisance or menace consists in a certain use capable of correction and regulation, the finding and opinion of the Court that the evil must be eradicated is not sustained and the ordinance must be held to be unreasonable in that it requires something beyond the necessities of the case.

1. A railroad operating under legislative and municipal authority is not a nuisance.

A nuisance is defined as anything that *unlawfully* worketh hurt, inconvenience or damage.

People v. Metropolitan Telephone & Telegraph Co., 11 Abbott (N. S.) 304, 317.

It is also said a nuisance is a tort.

Merrill v. City of St. Louis, 83 Mo. 244, at 255.

It could not be a tort unless it is a legal wrong. What is done in compliance with the law could not be held to be done in violation of the law.

A railroad running through the streets of a city not materially interfering with the use of the street for ordinary purposes, cannot be deemed a nuisance.

Hamilton v. New York & H. R. R. Co., 9 Paige 171, 173.

A railroad so constructed as not to exclusively occupy the street in which it is placed, but leaving the street open and free for ordinary purposes, cannot be deemed a nuisance.

Lexington Railroad Co. v. Applegate, 38 Ky. 289, 299.

The interference with the public use of Seventeenth Street for ordinary purposes is very slight, amounting to less than ten minutes out of the entire twenty-four hours, and that use occurs between midnight and 3 o'clock A. M. when there is practically no use of the street for ordinary purposes.

It appears from the evidence and from the plat opposite page 74 of the record that the track in question does not occupy the street to the exclusion of street use for ordinary purposes. The occupation of the street, therefore, does not in any sense respond to the definition of a nuisance.

This Court says, in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, at 17:

“Tracks laid in the street under legislative authority, become legalized, and when used in the customary manner, cannot be treated as unlawful either in maintenance or operation.”

In *Baltimore & Potomac Railroad Co. v. Fifth Avenue Baptist Church*, 108 U. S. 317, at 331, this Court says:

“The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, and is inseparably connected with the exercise of the franchise granted by the State.”

In *City of Chicago v. Oak Park R. R. Co.*, 250 Ill. 486, at 498, the Court says:

“It is contended by appellant that it has the power to declare such a situation as is here presented to be a nuisance and to suppress the same. Appellee is conducting its business in accordance with the grant made originally by the town of Cicero. It constructed its road by authority of law, and is operating it, under the terms of the grant, for the accommodation of the public. The city cannot, by a mere declaration, show the operation of the appellee’s road through the territory in question to be a nuisance and subject its tracks to removal. The public welfare demands that there should not be a discontinuance of the operation of an authorized railroad.”

In *City of Bushnell v. Chicago, Burlington and Quincy Railroad Co.*, 259 Ill. 391, the Court says, at pages 396-7:

“A railroad, having acquired a right to the use of the streets of a city, cannot be required to take up its tracks or abandon the use of the streets by the declaration of the city council that the operation of its railroad is a nuisance.

The operation of the railroad is a lawful business, and if it enters the city it must cross the streets not only with its main tracks but with its side tracks. The switching of cars and the use of locomotive engines for that purpose are necessary for the transaction of its business, and neither the existence of the side tracks, nor their use in switching, nor the use of locomotives for that purpose, can be prohibited. The city has the authority, in

the exercise of the police power, to regulate the manner of using the switch tracks so that they shall not be operated in a manner dangerous to the lives or limbs of persons using the streets, so that public travel and the use of the streets shall not be unreasonably interfered with, so that the community in the vicinity of the railroad shall not be put to unreasonable inconvenience in the use and enjoyment of their property. It is the alleged use of the switch tracks in such a manner as to produce such public inconveniences which is the evil sought to be remedied. The remedy must be reached, not by the destruction and removal of the switch tracks, which are lawfully located, but by the regulation of their use."

The Court continues at page 398:

"In *City of Chicago v. Union Stockyards and Transit Company*, 164 Ill. 224, we said (p. 236): "We agree with counsel for appellee that a distinction must be taken between the structure itself and the use to which it has been put. The unlawful use may be prevented without destroying the structure, which has been lawfully erected. The power in the city to abate nuisances is not denied, but it does not follow that the city may, as the easiest way to abate the nuisance, destroy valuable private property susceptible of use for a lawful purpose.' "

In *City of Denver v. Mullen*, 7 Colo. 345, the question involved was whether the city could abate a ditch as a public nuisance. The Court says, at pages 353 to 354:

“The basis of authority for the action of the city in the premises is made to rest upon certain provisions of the city charter, and certain ordinances, which are set out as exhibits in the testimony; and the following, among other of the enumerated powers conferred by the legislature upon the city, in said charter, is relied upon, viz.: ‘To make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same.’

The proper construction of this language is, that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may, by such ordinance, define, classify and enact what things or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might, under such authority, declare by ordinance that slaughter houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstructions or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination. * * *

If it were admitted that this ditch, by reason of its obstruction to the use of the public streets, at the time of the acts complained of, was a nuisance, it must also be admitted that it was not a nuisance *per se*.

It was constructed for a necessary, useful and lawful purpose, and therefore in its nature was not a nuisance, as a matter of law. Nor as a matter of fact was it a nuisance while it was no hurt, detriment or offense to the public, or to any private citizen. If, then, it has become a nuisance, it is by reason of a change of circumstances brought about neither by the ditch itself, nor its use. Indeed, the sole matter complained of, to warrant its being regarded as a nuisance, is the absence of bridges at street crossings. The town has become populous; its growth has extended beyond the ditch and along its line for a great distance; streets laid out across its course have come to be traveled so much, that, without bridges, the ditch, as appears by the testimony, has become inconvenient, detrimental, and an obstruction to the full, safe and lawful use of such streets as highways by the public. To this extent, and from these causes outside the ditch and its use *per se*, has the ditch come to be a public nuisance, if, as a matter of fact, it is such. But whether it is such or not, is a fact which must first be ascertained by judicial determination before it can be lawfully abated, either by the public or by a private person."

The Court further says, at pages 358 and 359:

"The ditch, then, must be held to have been lawfully constructed. * * * Admitting, then, that the testimony shows that by reason of the increase in travel and traffic upon the streets crossing the ditch, consequent upon the growth of the city, the ditch is such an obstruction to the use of the streets as to be properly deemed a highway nuisance, we may also say that its character as a nui-

sance is not by such testimony established to exist in any other respect than as such obstruction to certain streets; and further, such character consists solely in the absence of bridges at the crossings, and in wholly contingent upon this circumstance.

The removal of the nuisance, therefore, without the destruction of the property in question or interference with its use, as heretofore enjoyed by defendants in error, can be effected by bridging the ditch properly at the street crossings."

In *Hudson Telephone Co. v. Jersey City*, 49 N. J. Law 303, at 306, the Court says:

"But that the common council has the power, at its mere will, to annul the act which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance, which can be at once abated and their business thus destroyed, I cannot admit."

If the reasonableness of this ordinance is proved because the thing is a nuisance as the Supreme Court of Colorado implies, and the City has power to declare the track a nuisance, it follows that the City may declare its ordinance reasonable by merely declaring the track a nuisance.

2. If a nuisance and menace do exist they result from the use of the track not from the mere existence of the track.

There is no pretense that the rails and ties properly imbedded in the ground present any obstruction to travel or occasion any danger or injury to the public. In the nature of things the

track properly maintained could not be a source of danger or impediment to travel, and if it is not properly maintained it is certainly within the power of the City to compel suitable maintenance. The stipulated facts do not mention that the track itself opposes in any degree the ordinary use of the street or in any manner interferes with safe travel, and it must be assumed, therefore, that the track does not afford any ground for the conclusion that it is a nuisance.

The danger or interference, if any, results from running trains over the track; and that use may be regulated at this point as it is regulated at other points in the City without destroying the track itself. Regulation being the natural, the reasonable and the sufficient means of eliminating the danger, that method must be resorted to. A destruction of the track itself being an unnecessary and an unreasonable method, cannot be resorted to.

In *City of Colorado Springs v. Colorado and Southern Ry. Co.*, 38 Colo. 107, the facts of which we have heretofore stated, the Court holds and says, at page 111:

“The crossings of the tracks at the intersections of such streets and alleys with Saguache Street were planked, in good condition, and constituted no obstruction to the use of the street; travel, including wagons, could use the street lengthwise by going between some of the tracks, also by the use of other portions of the street, particularly on the easterly side of Saguache Street. There was some difficulty, by reason of the tracks not being planked, in passing from one side of the street to the other at points other than

the intersections of the streets and alleys. This impairment, however, of the use of the street could have been removed, if the convenience and extent of travel justified it, by the council requiring the tracks to be planked. This our statutes authorized, as did explicitly section 4 of the ordinance under which defendant exercised its franchise to occupy the street. Subdivisions 18, 20, 21, par. 7, section 4403, 2 Mills' Ann. Stats.

Where there is so simple a remedy for such condition, a court would not be justified in resorting to the extreme remedy of ordering the defendant to tear up its system of tracks.

We agree with counsel for appellee that a distinction must be taken between the structure itself and the use to which it has been put. The unlawful use may be prevented without destroying the structure which has been lawfully erected. The power in the city to abate nuisances is not denied, but it does not follow that the city may, as the easiest way to abate the nuisance, destroy valuable private property susceptible of use for a lawful purpose."

In *Bristol Door and Lumber Co. v. City of Bristol*, 97 Va. 304, at 308, the Court says:

"When a building is a nuisance only because of the uses to which it is devoted, the building itself cannot be pulled down to stop the nuisance, but only the wrongful use can be stopped. 2 Wood on Nuisances, Section 738. Indeed, it would require a great stretch of judicial power for a court of equity to sanction the abatement of a building as a nuisance, when the building itself does not, but only its

use, constitutes the nuisance. The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury. It is only necessary to be rid of the persons who use the buildings for an unlawful or improper purpose, and the law affords ample remedies, by indictment and otherwise, to accomplish this purpose."

In *City of Chicago v. Oak Park Railroad Co.*, 250 Ill. 486, at 496 the Court says:

"This ordinance is, in effect, an attempt to revoke the license of appellee to use the street under the terms of the ordinance giving it that permission. The grant by the town of Cicero, and by which the city of Chicago is bound, was accepted and acted upon in a substantial manner by appellee and its assignor and now constitutes a contract binding and obligatory upon appellant and appellee, which cannot be arbitrarily broken. The city of Chicago undoubtedly has the right, in the exercise of its police power, to regulate the use by appellee of its tracks and cars in a reasonable manner, but it cannot, under the pretense of regulation, deprive the appellee of its property or of any of its essential rights and privileges acquired under the contract with the town of Cicero."

In *Harrison v. New Orleans Pacific Railway Co.*, 34 La. Ann. 462, the Court says, at page 467:

"It is true there may be at times a temporary obstruction and delay and inconvenience to vehicles other than the railway carriages, but these are inconveniences to which individuals may be temporarily subjected, and to which the public interests are entitled. We find the street sufficiently wide for the use

of the railway, and while the trains are passing or stopping along the street, ordinary vehicles will be somewhat restricted in their movements and passage, it is not such unreasonable delay and obstruction as would justify the Court in enjoining the railway company from the enjoyment of the right which has been granted."

In *Dillon on Municipal Corporations* (5th Ed.), Section 1269, the author, speaking of rights to use a street for a public service, says:

"But these franchises are property which cannot be destroyed or taken from the grantee or rendered useless by the arbitrary act of the municipal authorities in preventing the grantee from using the city streets for the purposes of the grant, although the municipality may seek to justify such act as an exercise of the police power. Therefore, any regulations adopted by virtue of the exercise of the police power must be such as are called for by a fair consideration of the public welfare, must be reasonable in their character, and must not be such as to defeat the purpose of the grant. The franchise or privilege being founded upon a grant from the state, the municipal authorities cannot, by virtue of the police power, impose any conditions upon the exercise of the right granted which are inconsistent with the franchise or privilege granted.

"The state cannot, under the guise of the police power, pass laws, rules or regulations which ostensibly have for their end or purpose, the comfort, safety, welfare and protection of society, but which are, as a matter of fact, passed for the purpose of impairing or destroying private rights and private property, or attacking personal interests."

A police regulation must be based upon public necessity.

City v. Tele. Co., 80 Neb. 460, 467.

In Tiedeman's Limitations upon Police Powers, the author announces the rule that the Legislature may define the manner in which one may use his property and says, at page 5:

"Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve any infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare, and the general security, cannot be included in the police power of the government. It is a governmental usurpation and violates the principles of abstract justice, as they have been developed under our republican institutions."

And again at page 440:

"But in all these cases, the interference with the enjoyment of private property, whether by the state or by the individual, must be justified by the proof of two facts, viz.: first, that the property, either *per se* or in the manner of using it, is a nuisance, and secondly, that the interference does not extend beyond what is necessary to correct the evil. To extend the exercise of the power of abatement, beyond the point of necessity, would make the interference unlawful."

The same author refers to regulations of corporations, and says, at page 593:

"Here, as elsewhere, however, the exercise of police power must be confined to those regulations which may be needed, and which do actually tend, to prevent the infliction of

injury upon others; and it is a judicial question whether a particular regulation is a reasonable exercise of the police power. The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the legislature; but whether a given regulation is a reasonable restriction upon personal rights is a judicial question."

In *Grand Trunk Railway Co. v. City of South Bend*, 227 U. S. 544, at 554-555, this Court says:

"Tracks laid in a street, under legislative authority, become legalized, and, when used in the customary manner, cannot be treated as unlawful either in maintenance or operation. As said by this court, 'a railway over the * * * streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded.'"

"The power to regulate implies the existence and not the destruction of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated permanent and not temporary structures, granted a permanent and not a revocable franchise."

3. The reasonableness of the exercise of the police power which destroys a long existing right is not tested by present conditions.

If the Railroad were attempting to initiate a right in the street in question and the City should pass an ordinance prohibiting the use of the street in the manner proposed, the reasonableness of that ordinance could be tested by considering all of the present circumstances. Where the railroad initiated the right more than forty years ago and has enjoyed the right during the entire intervening period and the City attempts by ordinance to destroy the right, the reasonableness of the City's action is not tested by present conditions.

(a) The right of the Railroad is not tested by the use made of the track at the time the repealing ordinance was passed, nor even by the use made of it during the long period of occupation.

The Supreme Court says the track,

“* * * was originally the main line of the Company, but for more than twenty years has been used merely as a switch track to serve certain manufacturing and other interests between Seventeenth and Nineteenth Streets on Wynkoop” (fol. 179).

The right of the Railroad is not in proportion to the use made of the right nor is it qualified by the character of the use. The charter of the Railroad and the grant by the City do not limit or prescribe the use.

Reduction in use is favorable to the continuance of the use rather than a consideration against it. The use of the track now *for switch purposes only*, contrasted with prior use *for main line and switch purposes*, indicates that the burden upon the street is

now lighter than it originally was and the consequent interference with travel correspondingly reduced.

The number of industries served by this track is not a measure of the right. The right was not conditioned that it should cease when the use became thus limited. It is the *right of the Railroad to give service*, not the right of the industries to *receive service*, that is determinative of the right of the Railroad to maintain the track.

(b) The fact that the track was at one time used solely for one purpose incident to the carrier business and at a later time used for another equally appropriate purpose of carrier business, does not affect the right of the Railroad.

The Supreme Court says:

“For twenty years the Company has abandoned the track as a part of its main line, and its use as a switch track has *been permitted* by ordinances passed from time to time” (fol. 181).

This statement implies that the Railroad is at this time a mere licensee of the City.

The charter of the Railroad has never been revoked and the City has no power to revoke it.

It is immaterial that the City attempted by ordinance to license the use for the past twenty years, for the reason that the Railroad had complete right to use the street *without any such license from the City*. The assumption on the part of the City to give a license could not alter the *prior complete and unimpaired right*. If on the other hand the City had

power to license, it had not the power to revoke the license at will after the Railroad had acted upon it in pursuance of its charter and after the Railroad had made the expenditures and improvements demanded by the City.

The ordinances of the City which are referred to as *permitting* a use do not profess to give permission, they *grant*, *confirm* and *supplement* the right.

(c) The fact that the Railroad at one time used the track to reach a station at Nineteenth and Wynnkoop Streets and later used another route to reach another station does not affect the original right.

The Supreme Court says:

“The Company has right of ingress and egress to the Union Station over another route” (fol. 179).

The charter of the Railroad was not on condition that it should cease if and when the Railroad acquires a right over some other route to some other terminal point.

(d) The fact that certain shippers served by the track could be served by some other carrier, does not test the right of the Railroad.

The Supreme Court says:

“* * * the few establishments between Seventeenth and Nineteenth Streets now accommodated by the track may be readily taken care of over another route” (fol. 179).

The other route is not owned by the Railroad and if it be utilized the business goes to a competitive

line (fol. 130), and service over the other route will entail extra switch charges to be paid either by the "few industries" or by the Railroad (fol. 140).

This theory of determining the right of the Railroad suggests that in all cases where there is more than one track serving an industry, all but one may be eliminated irrespective of the property right of the owner of the track so eliminated.

(e) The fact that the use made of the street by the public has increased and the use made by the Railroad of the track has diminished since the track was originally built, does not destroy the right of Railroad to use the track for such pertinent carrier uses as remain.

The Colorado Supreme Court says:

"For twenty years the Company has abandoned the track as a part of its main line.
* * * The growth of the City, with subsequent increase of traffic across the intersection, and its augmented importance as a thoroughfare, make it apparent that the municipality has justly concluded that it is in the interest of the public to restore the street exclusively to its original use" (fol. 181).

In *Baltimore and Potomac Railroad Company v. Fifth Baptist Church*, 108 U. S. 317, at 331, this Court, speaking of the contention that conditions had so changed since the railroad was originally built that removal of the track was justified, says:

"If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure."

(f) The reasonableness of the ordinance is not tested by comparing the importance and extent of the use of the track with the incidental interference with the public travel on the street and ignoring the right of the Railroad to maintain the track under its charter and other grants of right.

The Supreme Court says:

“Viewing the interests of those served by the track on the one hand, and the rights of the public upon the other, and taking into consideration the fact that those now using the track may be equally well accommodated in another manner, the ordinance for its removal is eminently reasonable” (fol. 181).

This proposition ignores the right of the Railroad and fails to take into account any equities in favor of the Railroad and tests the reasonableness of the ordinance by balancing the interests of “those served by the track” against the “public.”

The proposition is not defensible even if a comparison were fairly and accurately made. The Court suggests that service in some other manner will afford equal accommodation to shippers. The record shows that the service under the latter condition will not be as direct and will involve additional expense.

4. Reasonableness of the repealing ordinance cannot be tested by anticipated conditions.

The Supreme Court of Colorado says:

“It is contended by the company, however, that use of the track causes little, if any, inconvenience to the public for the reason that

it is used only at hours during which travel across the intersection is comparatively light. It is well settled that the only limitation to the exercise of the police power is that such exercise shall be reasonable. Railway timetables are not fixed and immutable, and any change in these governing the arrival and departure of trains at the Union Station may make those hours in which the track is now used by the company those in which many trains are arriving and departing from the station" (fol. 179).

The Court does not criticise or deny the statement that there is little inconvenience to the public under present conditions, but speculates that railroad companies may change the hour for arrival and departure of trains so that many trains shall depart from or arrive at the station during the hours in which the track was heretofore used, that is, between the hours of midnight and 3 o'clock in the morning. While it is possible it is not at all probable that the public will submit to such inconvenience at the hands of railroad companies.

The reasonableness of the action of the City cannot be tested by conditions that have never existed and which in all probability will never exist and concerning which there is no evidence.

In *City of Bushnell v. Chicago, Burlington & Quincy Railroad Company*, 259 Ill. 391, the Court says at page 398:

"The ordinance here in question also declares that to be a nuisance which is not a nuisance, but which may become a nuisance under certain circumstances. The ordinance

should be directed against the circumstances which are harmful and not against the switch tracks, which are not."

The status at the time the track was built determines the nature of the grant and the grant once vested as a franchise right cannot be changed into a mere license by the fact that subsequently the track ceased to be used for a main line and was used to serve local industries nor can it be tested by speculation as to what may happen in future.

Upon the record and upon principles of law and equity, this Court is asked to protect the Railroad against the action of the City.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 801.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

PLAINTIFF IN ERROR.

vs.

THE CITY AND COUNTY OF DENVER, ET AL.,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF COLORADO.

No. 802.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER, ET AL.,
DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE CITY
AND COUNTY OF DENVER, STATE OF
COLORADO.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The City omits from the enumerations of contentions attributed to the Railroad, assignments of error numbered Second, Third and Fourth, (printed rec-

ord page 133), and makes no reference to the argument in the brief of the Railroad under "II. Constitutional Provisions: 1. Prohibition against impairment of contracts" (Railroad Brief, Pages 69 to 79).

The City omits these matters, perhaps upon the theory that there is no contract and no property, consequently nothing for the constitution to protect. The Railroad, however, reaffirms that under the facts and under the law applicable the Railroad must be protected, even though there should be no express specific contract, and no formal grant of property. The position occupied by the Railroad demands the same protection which the constitution gives to specific contracts and tangible property.

The City states its contentions; (City Brief, Page 5).

1. Neither Congress of the United States, the Legislature of the Territory of Colorado, nor the City of Denver, conferred upon the Railroad any right to occupy the street in question.

2. The City cannot be estopped to deny the validity of an *ultra vires* act.

3. No matter what right the Railroad had, the City had power to oust it from the street.

Denial of the right of the Railroad is unnecessary if the third proposition and the opinion of the Supreme Court of Colorado are correct, namely, that it was the right and duty of the City to remove the track "without regard to the character of the right upon which it was first established and maintained." (Record, page 106). This argument is, *pro tanto*, a confession that the opinion of the Court is wrong, or may be wrong.

The Railroad reviewed the several statutes and ordinances upon which its rights rest, and at pages 37 to 60 of its brief, presented arguments in support of the validity of the right. It is there made clear that Congress of the United States, and the Legislature of the Territory of Colorado, and the officials of the City of Denver, co-operated in an effort to provide railroad facilities for the City of Denver, and that each in its own sphere did all that seemed necessary to accomplish the common purpose in mind. If the Railroad acquired no right in this street, no other railroad in the City of Denver, located prior to 1874, has any right, the same local and legal conditions affect all roads. Yet this is the first and only instance of record in which the City has asserted a lack of power and attempted to oust the occupant. Even now, neither Congress nor the State of Colorado is making any attempt to oust any of the railroads from the City.

A proper consideration of this condition requires that the entire group of laws, acts, ordinances and facts be taken into the reckoning if equitable results are to be reached. The argument of the City proceeds, not upon a general survey of all, but upon the separate and isolated acts of the legislature of the territory, and the separate acts of the City, and the separate Acts of Congress.

The argument of the City proceeds as follows :

Under point I (City Brief, Page 7) the City discusses the right of the Legislature of the Territory of Colorado to grant authority to the Railroad to occupy the street in question. The argument is that

the Railroad filed its articles of incorporation under the General Incorporation Laws of the Territory and became a corporate body under those laws, but that the Legislature of Colorado did not by any separate, individual act attempt to confer upon the Railroad any specific authority or right to occupy the street in question.

Under point III (City Brief, Page 20) the City discusses the effect of the Act of Congress of 1872, and says that at the time the Railroad was incorporated in 1870, Congress had not given to the Legislature of the Territory power to provide by statute or otherwise for the incorporation of railroad companies. That is true, but Congress, by the Act of June 10, 1872, 17 U. S. Statutes at Large 390, refers to the fact that the Act of March 2, 1867, does not confer power to incorporate railroads, but says that from and after the passage of the amendatory act that the prior act "shall be construed as having authorized and as authorizing the Legislative assemblies of the Territories of the United States, by general incorporation acts to permit persons to associate together as bodies corporate for the purposes above named." (See Brief of Railroad, Pages 9 and 10). This was a curative retroactive amendment.

The City then says that the Legislature of the Territory of Colorado had no power by reason of the provisions of the Act of Congress of March 2, 1867, to grant a private charter or special privilege, (City Brief, Page 23). Therefore the Territorial Legislature was powerless to grant to the Railroad any specific right to occupy the street in question.

The City argues, under point II, (City Brief, Page 14) that the attempt of the City by ordinance of 1871 to grant to the Railroad the right to use the street was *ultra vires* because the Legislature of Colorado had not, at that time, granted to the municipal corporation the power to license a railroad to use the streets, and further because the Territorial Legislature had no power to grant a special license or charter, and having no power to grant such charter directly, it had no power to authorize the City of Denver to grant such charter.

Putting these arguments together, we have the following results:

1. Congress of the United States granted to the Legislature of the Territory of Colorado complete dominion over the townsite of Denver.

2. Congress of the United States, by direct act or by curative acts, authorized the Legislature of the Territory of Colorado to provide for the incorporation of railroad companies under general incorporation laws.

3. Congress of the United States prohibited the Legislature of the Territory of Colorado from granting private charters or special privileges.

4. The Legislature of the Territory of Colorado did not authorize the City of Denver to grant to the Railroad the right to use a street.

By reason of these conditions it is said the Railroad obtained no title or right from the Legislature of the Territory of Colorado under or by which it could utilize the street in question. It merely obtained from the Legislature, by reason of its incor-

poration, the power to acquire by some means not defined and from some authority not designated, the right to occupy the street. The Railroad acquired no right from the City, because the City was not authorized to grant a right. Therefore the Railroad was and is without any right whatever in the street.

The result is that while the Legislature had this complete dominion, it had no power to exercise it. The City suggests that the Railroad should have condemned a right of way in the street (City Brief, p. 9). But the fee of the street was in the City in trust for public use and the Railroad could not condemn a street already devoted to another and paramount use.

Here is presented the remarkable spectacle: the Territorial Legislature and the City authorities desire to encourage the building of a railroad, but separately or together they are powerless and helpless.

What became of the power and authority which Congress conferred upon the Legislature of the Territory? The City says that the Legislature never delegated it to the City, and there is no evidence that it ever delegated it to any one else. The presumption is therefore that it remained in the Legislature. If it remained in the Legislature there must have been some method for its exercise. The City says it could not exercise it directly by granting private charter or special privilege and cites *The Denver and Swansea Railroad Company v. The Denver City Railroad Company*, 2 Colo. 673, for the proposition. Assuming that the proposition is correct, it established the point that the Legislature could not by

direct, special, individual act confer a special privilege upon the Railroad. There is but one other means left, therefore, by which the territorial legislature could exercise its power and control over the streets of the City, and that is by general laws. One of such general laws was a law providing for the incorporation of railroad companies for the purpose of building, maintaining and operating railroads. When, therefore, that act of 1868 was passed providing for the incorporation of railroads, and when the Railroad was incorporated in 1870 in pursuance of that act, and when it specified its terminus as Denver, and built its tracks through the City of Denver to the station then in existence, the Legislature of the Territory accomplished exactly what it was authorized to accomplish, namely, the licensing of this Railroad to serve the City. If this method of licensing was not permissible we are driven to the conclusion that the Legislature of the Territory having licensed the cities and towns in the Territory, existing under general charters, to permit railroad companies to occupy the streets intended by implication to grant such power to the City of Denver or any other city operating under special charter whether such power and right was specifically given or not.

As Mr. Dillon says, in his work on Municipal Corporations, Section 1233:

“Legislative authority to railroad companies to occupy the streets of an incorporated place, although it must exist to warrant the occupation, need not be expressly conferred, but may be given by necessary implication.”

This doctrine has been accepted in Colorado.

In Denver and Santa Fe Railroad Company, et al. v. Domke, et al., 11 Col. 247 at 249, 250, the court says:

“The constitution (Article 15, Section 4) declares, *inter alia*, that ‘any association or corporation organized for the purpose shall have a right to construct and operate a railroad between any designated points within the state’. It may happen that one of the ‘designated points’ is within the corporate limits of some city or town, and can only be reached through a street.”

The court then refers to powers conferred upon the City to regulate the use of locomotive engines and direct the location of railroad tracks, and says:

“This statute clearly contemplates the use of streets by ordinary railroads. Unless such use was in the legislative mind its provisions are meaningless.”

The court then refers to the fact that the fee of the streets of Denver vested in the City in trust for the use of the public, and continues:

“The legislature has delegated the exclusive control of the streets to the municipal authorities, subject only to its own paramount dominion. We think the authority of the City council to permit the construction and operation of an ordinary railroad through the street rests upon clearly implied, if not express, legislative sanction.”

This doctrine of implied power was early recognized in Colorado in Railroad Company v. Mollandin, 4 Col. 154.

The City contends, however, that even if the ordinances of 1871 were recognized as an attempt to

exercise any conferred or implied power, that that ordinance was *ultra vires* because, as already suggested, neither the Territorial Legislature nor the City could grant an exclusive right. It is sufficient to suggest that the case cited for the proposition, Denver and Swansea Railroad Company v. Denver City Railroad Company, *supra*, does not cover this case. The charter or grant condemned in that case was upon its face an exclusive right, as the court says at page 674:

“Complainant claimed an exclusive right, under said act, to construct and operate railways in the City of Denver for transporting passengers for hire.”

The ordinance of 1871 did not purport to grant an exclusive right.

The City says that even if the ordinance of 1871 were held valid, the rights granted thereunder have long since lapsed because of the expiration of the charter of the original grantee (City Brief, pp. 28-29. For the proposition that in Colorado, rights granted terminate with the termination of the corporate existence of the grantee, the City cites Toll Road Company v. People, 22 Col. 429. That case relates to a toll road and the court says at page 436:

“The right to collect tolls, as we have seen, does not exist as a common right. It is conferred by the Legislature in return for some supposed public good.”

At page 438 the court points out that there is no provision under the laws of the State of Colorado for the renewal or extension of the corporate exist-

ence of a toll road company. That situation is explained on the theory that it was considered that after the company had enjoyed the franchise, which was primarily the right to collect tolls for the period of its corporate existence, the public had paid it for the construction of the road, and the public were entitled to take the road over. The question involved in that case was whether or not the company that bought the property of the toll road acquired with it the right to collect tolls from the public who used the road, and the court decided that the purchaser did not have such right because of the peculiar character of the property and because of the peculiar condition of the statutes of Colorado.

None of these arguments apply to the case now in hand. Judge Dillon, in his work on *Municipal Corporations*, Section 1268, upholds the rule that a grant by a municipal corporation, does not terminate on the expiration of the corporate existence of the grantee, but survives to the assigns of the grantee. He says that a rule which terminates such grant on the termination of the corporate existence of the grantee is analogous to the rule at common law that a deed to a person without mentioning his heirs would pass no title beyond the life of the grantee, and refers to the fact that that rule is now abrogated. This court has recognized the soundness of Judge Dillon's opinion, and has held that such grant is in perpetuity.

Detroit v. Railway Company, 184 U. S. 368;
Louisville v. Telephone Company, 224 U. S.
649;
Trust Company v. Omaha, 230 U. S. 100;
Owensboro v. Telephone Company, 230 U.
S. 58.

This rule was adopted in *Colorado in Denver and Swansea Railway Company v. Denver City Railway Company*, 2 Col. 672. The court says at page 682 that such an ordinance, "conferred such privilege in perpetuity, if there is no limitation to it in point of time, and no power of revocation is reserved to the City council thereunder." Moreover, Sections 63, Chapter 18, Revised Statutes Colorado, 1868, provides that property acquired by any company organized or incorporated under that act "shall be and remain in such company, their successors and assigns." That statute must be read into the ordinance of 1871. *Denver v. Water Company*, 229 U. S. 123.

It is universally held that where a grant runs to a company, its successors and assigns, the grant is in perpetuity.

Owensboro v. Cumberland Telephone Company, 230 U. S. 58;

Trust Company v. Omaha, 230 U. S. 100;

Louisville v. Trust Company, 224 U. S. 649.

Not only in respect to the original grants and acts does the City insist upon viewing the several proceedings piece-meal, but it also insists that the doctrine of estoppel against the City must be determined and tested, not from the entire transaction, but from the transaction phase by phase.

The City contends "V. Estoppel and Consent" (City Brief, p. 29), that the City could not ratify an *ultra vires* act, and cannot be estopped from repudiating an *ultra vires* act, and cites authority for that contention. Where no loss will follow the repudiation of the *ultra vires* act, where no unjust

enrichment will inure to the City by such repudiation, where nothing is involved but the endorsement or repudiation of the *ultra vires* act, the principle stated may be applied, but the doctrine has no place in a court of equity when repudiation amounts, under the circumstances, to perpetration of a fraud upon innocent victims.

Judge Dillon, in his work on Municipal Corporations, 5th Ed., Sec. 1191, says:

“But although the courts of Illinois do not permit rights to be acquired in the city streets and public places by mere adverse possession, yet they have frequently held that the doctrine of estoppel *in pais* is applicable to municipal corporation, and that they will be estopped or not as justice and right may require; that there may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud, as where a party acting in good faith under affirmative acts of the City has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired. Under such circumstances the doctrine of the equitable estoppel will be applied. The court does not consider that there is either danger to the public or injustice in the application of the doctrine of estoppel under such circumstances. In the exercise of proper diligence the public authorities may prevent encroachments upon public streets, and if they do not, any citizen may take the necessary steps to do so; and if there is not only a failure to act by either, but affirmative action with the apparent approval of every one interested, and the situation is changed by permanent improvements being made, the principles of equity require that the public should be estopped.”

In *Louisville v. Cumberland Telephone Company*, 223 U. S. 649, at 662, and in *City of Seattle v. Columbia, etc. Railroad Company*, 6 Wash. 379, at 387, and *People v. City of Rock Island*, 215 Ill. 488, at 495, cited in the brief of the Railroad at pages 64 to 66, it is made clear that the mere fact that the action of the City in the first instance was *ultra vires* will not prevent the City being estopped, where to permit it to repudiate its act would be unconscionable and would work a fraud. The United States Government is amenable to estoppel in an equity case. *United States v. Stinson*, 125 Fed. 907, at 910.

Moreover, after the City had received a specific grant of power from the Legislature, enabling it to grant a right of way to the Railroad, it put forth numerous encouragements to the Railroad to build sidetracks and switches, always ratified and confirmed the previous grant. These acts culminated in 1912 in an ordinance requiring the Railroad to pave the street at an expense of \$30,000. What inference can be and must be drawn from these acts, except that the City recognized and confirmed the right of the Railroad to maintain the track here in question? The sidetracks could not be operated without the main track; the paving could be of no benefit to the Railroad if its main track must within a few months, be removed.

The trial court found that the conduct of the City, after it received a full grant of power, estopped it to interfere with the track by the ordinance of 1914. (Finding Record, page 95.)

In *Detroit United Railway v. City of Detroit*, 248 U. S. 429, it appeared that a railroad company had

no right in certain streets of the city, but had rights in other streets. The city, by ordinance, undertook to regulate fares and other matters applying generally to the entire street railway system. This court held that the action of the city estopped it to deny the right of the railroad company to operate and collect fares over that portion of its trackage in respect to which it had no franchise rights. This court says at page 435:

“In our opinion, the case in this respect is ruled in principle by *Denver v. Denver Union Water Company*, 246 U. S. 178. In that case the franchise of a Water Company had expired, and the City might have refused the further use of the streets to the company. Instead of doing this it passed an ordinance fixing rates and requiring certain duties of the company. We held that in that situation the company was entitled to make a reasonable return upon its investment. So here, the City might have required the company to cease its service and remove its tracks from the non-franchise lines within the City. Instead of taking this course the City enacted an ordinance for the continued operation of the company's system with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not. This action contemplated the further operation of the system, and fixed penalties for violation of the ordinance. By its terms the ordinance is to continue in force for the period of one year, unless sooner amended or repealed. This was a clear recognition that until the City repealed the ordinance the public service should continue with the use of the streets essential to carry on further service. Within

the principles of the Denver Case this service could not be required without giving to the company, thus affording it, a reasonable return upon its investment. In Denver Case we said: 'The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs.' The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual."

The principle announced in those cases applied to the facts in this case, result in a declaration that the City has not only by one act, but by a series of acts, committed itself to the continued existence of the track in question. It is manifestly inequitable for the City to encourage the Railroad to build side-tracks and spurs leading off the track in question and to encourage merchants to locate their warehouses and places of business along this track, and to encourage or require the Railroad to spend money for the improvement of the street on the assumption that it shall enjoy the fruits of such improvements, and then, without warning or compensation, destroy the track upon which all of these accessories depend. It must be assumed that the City contemplated, and that the parties contemplated that the Railroad should at least be permitted to continue in the street until a reasonable return should be received upon the large investment it was compelled to make.

Under "VI. Conditions Precedent" (City Brief, p. 36), the City contends that the ordinance of 1871 contained conditions which the Railroad never per-

formed and that therefore the grant contained in the ordinance failed. This argument is not sound for the following reasons:

1. There is no condition in the ordinance of 1871 which relates to the track in question.

The right to lay the track here in question is granted by sections 1 and 3 of that ordinance. In addition to the right to lay this track there was a separate provision contained in Section 2 granting the right to build depots, turn tables, and water tanks, and for the use of the streets and lands in connection with such improvements, but, the right to build such accessories was conditioned upon the Railroad owning lands on both sides of the street. The condition therefore, applies merely to the right to build these accessories. In the nature of things there was no need of the Railroad acquiring ownership of the abutting property merely for the purpose of running a railroad in the middle of the street, but there is an absolute necessity for the Railroad to own lands upon which to place depots, turn tables and water tanks before it could provide such accessories. The meaning of the ordinance is too plain to warrant argument.

2. Even if such conditions were attached to the building of the track in question, and even though that condition had not been complied with, acquiescence by the City for forty years would amount to a waiver of that condition. The principle involved is made clear in *Colorado Springs v. Colorado Railway*, 38 Colo. 107, cited and quoted in the Railroad brief at pages 62 to 64, and in other cases cited in connec-

tion therewith, and is likewise applied in *Dern v. Salt Lake City Railroad Company*, 19 Utah 46, at 60 and 61; *C. E. L. & P. Co. v. Tacoma*, 17 Wash. 661 at 670, 671, and *Seattle v. Columbia etc. R R. Co.*, 6 Wash. 379, at 387, 388.

3. The condition was intended for the benefit of abutting owners, and no complaint has been made by those for whose benefit the condition was imposed.

Under "VII. and VIII. Interstate Commerce and Police Power" (City Brief, p. 40), the City asserts that corporations engaged in public service are peculiarly amenable to the police power. The inference is that they are subject to the exercise of the police power under conditions and circumstances in which individuals or corporations otherwise engaged would not be, or that they are subject to more severe police regulation than those not so engaged.

Perhaps public service corporations are more often affected by exercise of the police power than are individuals or corporations engaged in private enterprises, but there is no different principle involved.

Tiedman's Limitations upon Police Powers,
Sec. 593.

It is next suggested that the City is not destroying the Railroad, "It is only demanding of the Company that for switching purposes it abandon the intersection of Seventeenth and Wynkoop streets, in order that the public safety may thereby be advanced" (City Brief, p. 44). Of course, breaking the track leaves the tracks lying east of Seventeenth street separated from the system to which they belong. They cannot be reached by the engines of the

Railroad. The argument involved is, that, admitting the track in question is an interstate commerce facility, nevertheless it may be destroyed in order to advance public safety. This is the proposition embodied in the opinion of the Supreme Court of Colorado. It is manifest that the suggestion involves a modification of Federal control over interstate facilities and makes such control subject always to local conditions. The Federal government may control interstate facilities whenever those facilities do not interfere with public safety.

It is further suggested that the City is not taking away from the Railroad its right to maintain a main line, that the City has provided the Railroad another route into another terminal, and that the Railroad must accept such other terminal and the route leading thereto in lieu of the track in question. (City Brief, pp. 44 and 51.) As pointed out in the brief of the Railroad, the right of the City to destroy the property of the Railroad, the reasonableness of the attempted exercise of the police power, are not determined by consideration of facilities the Railroad may have to reach other points, or to engage in other work (Brief, p. 100.) The question is whether or not the Railroad has a right to maintain the track in question. A particular track does not cease to be an interstate commerce facility in the event some other track serves the same purpose. One line of railroad does not cease to enjoy the protection of the Federal constitution because some other line of railroad might be used to accomplish the same transportation.

The claim that the City has furnished the Railroad facilities along another route to accomplish the same purpose that is served by the track in question, is not supported by the facts. The Railroad does not reach the Denver Union Terminal depot; it has no track through the depot grounds, and it has no trackage east of the depot grounds by which it could connect with the track owned by it in Wynkoop street east of Seventeenth street. The Railroad tracks end at the Union Station grounds at the westerly side of the station property. Within the station grounds The Denver Union Terminal Company owns the tracks and performs the service. (Finding of Fact No. 12, Record, page 54.)

The City contends that it could not surrender the police power or estop itself from exercising the police power because the police power is a function of sovereignty. Of course if that proposition were true in the broad sense in which it is asserted, the constitution of the United States prohibiting the impairment of contracts and prohibiting the taking of property without due process of law must fail, even though repudiation of the contract or destroying property is wholly inequitable and amounts to a fraud.

In closing the argument under this head the City disposes of the interference with interstate commerce with these suggestions (City Brief, pp. 53-54):

1. The track is not a facility of interstate commerce.
2. The City has a right to *inconvenience* interstate commerce so long as it does not destroy it.

Under the first proposition it is stated that since the track is not used as a main line, nor as a track for making up trains, but only as a means of receiving and delivering freight, it is not an interstate facility.

In *St. Louis & San Francisco Railway v. Seale*, 229 U. S. 156, this court says, at page 161:

“ ‘for unloading or delivering freight’ is ‘as much a part of the interstate transportation as was the movement across the state line.’ ”

It follows, therefore, that tracks used for delivering and receiving freight are as much engaged in interstate commerce as is the track used for transportation of property across the state line.

The City then says that even if the track were a facility of interstate commerce, taking it up would only inconvenience shippers, compel them to cart their shipments, or put the Railroad to the small expense of paying the Union Pacific, a rival carrier, for transfer service.

The argument suggests an amendment to the constitution of the United States.

In *Louisville & Nashville Railroad Company v. Central Stock Yards Company*, 212 U. S. 133, at 145, this court holds that to compel a carrier to turn a part of its competitive business to a rival is a confiscation of its property, and in *Mississippi Railroad Commission v. Illinois Central Railway Company*, 203 U. S. 335, at 346, this court says:

“Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight.

A wholly unnecessary, even though a small obstacle, ought not, in fairness, be placed in the way of any interstate road, which may thus be unable to meet the competition of its rivals."

Taking up the track in question will leave a portion of the tracks of the Railroad entirely divorced from the system. These tracks cannot be reached except over the lines of a rival, and the Railroad has no trackage rights over that line (Record, pages 77 and 78).

Extra expense in the form of switch charges is incurred which the Railroad must absorb in order to compete with its rival on a basis of equal charges, or if it is unable to compete by such absorption, the switch charge must be paid by the shipper. Are none of these consequences and forbidden interference with interstate commerce?

In *Illinois Central Railroad Company v. Illinois*, 163 U. S. 142, at 154, this court says:

"But the state can do nothing which will directly burden or impede the interstate traffic of a company, or impair the usefulness of its facilities for such traffic."

Does it burden interstate traffic to compel an extra switch charge of \$2 to \$5 per car? Does it impede the interstate traffic of the Railroad to require that all the traffic in question be moved through the Union Station, involving a haul over the Union Pacific Railroad and over the Denver Union Terminal Railroad to the connection with the Railroad? Does cutting off the tracks east of Seventeenth street on Wynkoop street from physical connection with the system of

the Railroad impair the usefulness of the facilities of the Railroad for interstate business? These questions must be answered in the affirmative.

The City persists that "the *great principle* involved is the same with reference to this interstate commerce question as it is with reference to the taking of property without compensation, and that is as to whether or not it is a reasonable exercise of the police power under the circumstances" (City Brief, p. 54).

This suggests an amendment to the constitution not only in respect to the interstate commerce provision, but also in respect to the prohibition against the abrogation of contracts and the taking of property without due process.

Under this amendment interstate commerce may be interfered with, or burdened, or destroyed by the state or a municipality *if the state or municipality decides that such interference is reasonable*. Likewise, a contract may be abrogated, or property taken, if the action is deemed by the state or municipality to be reasonable. Then there is no longer any restraint left in the constitution because, under all law, independent of the constitution, the act of the state must be reasonable and this prohibition of the constitution therefore adds nothing.

But even if the constitutional prohibition is subordinate to an exercise of the police power it must be only in a clear case where such exercise works no hardship or injustice.

Applying the test which the City suggests, namely, reasonableness, attention is directed to the fact that the City nowhere justifies the ordinance of 1914 as reasonable.

The Railroad pointed out in its brief (pages 84 to 104) that the ordinance from every standpoint is unreasonable. The track presents no obstruction or danger, the operation is now confined to the hours between 12 o'clock midnight and 3 o'clock a. m., and the total use of the track, even within that period, does not exceed ten minutes. The ordinance does not attempt to regulate the use by prescribing the speed or maintenance of watchmen, but arbitrarily orders that the track itself be removed. Under familiar rules, exercise of the police power, is limited to cases of necessity and cannot go beyond the necessities of the particular case. The City failing to show the reasonableness of this ordinance, and it having been pointed out in detail that it is unreasonable, it is necessary for this court, even upon the City's suggestion, to hold that the ordinance of 1914 is invalid.

In *Kansas City Southern Railway Company v. Kaw Valley Co.*, 233 U. S. 75, this court says at page 79, in respect to the prohibition against interference with interstate commerce:

“The decisions also show that a state cannot avoid the provisions of this rule by simply invoking the convenient apologetics of the police power.”

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 801.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

PLAINTIFF IN ERROR.

vs.

THE CITY AND COUNTY OF DENVER, ET AL.,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF COLORADO.

No. 802.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER, ET AL.,

DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE CITY
AND COUNTY OF DENVER, STATE OF
COLORADO.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error in its brief has made a comprehensive statement of the issues involved in this case and of its contentions in reference thereto, and it is only necessary now briefly to call the court's attention to what these issues are.

Briefly stated, the controversy is as to the right of the Denver & Rio Grande Railroad Company to occupy Wynkoop Street with railroad tracks for switching purposes, or more accurately, the right of the City and County of Denver acting through its council to require the Railroad Company to discontinue the use of a certain track used for switching purposes at the intersection of Seventeenth Street with Wynkoop Street.

Wynkoop Street lies parallel with and is the next street to Wewatta Street. The Union Depot in Denver was built between these two streets and extends for a distance of almost two blocks, also parallel with Wynkoop and Wewatta Streets. Seventeenth Street and the other numbered streets intersect Wynkoop Street at right angles (Record, pp. 121, 122). When the railroad was first built into Denver, it had its depot at Nineteenth and Wynkoop, two blocks from the intersection involved in this case, and from the time the road was first built and until 1881, the railroad track of the company on Wynkoop Street was used as its main line, but in 1880, the City of Denver vacated Wewatta Street, also Seventeenth and Eighteenth Streets, in order that all of the railroads coming into Denver might be confined to one place. The streets and alleys were vacated and abolished and appropriated

to the Union Depot and Railroad Company and its successors, for their sole occupancy and benefit. *Whitsett v. Union D. & R. Co.*, 10 Colo. 243, 247, 248. The Union Depot was built and sidetracks were established following the adoption of the ordinance vacating the streets and alleys for that purpose and since that time the tracks on Wynkoop Street have only been used as switches for the purpose of accommodating a few business houses abutting on the street. The D. & R. G. Railroad Company in common with other lines entering the City, have used the sidetracks on the other side of Union Depot and have not used Wynkoop Street as a main line since 1881 (Record, pp. 9, 10). Seventeenth Street is the main street in Denver leading from the Union Depot. It is occupied by street railway tracks, which tracks prior to the time that the railroad track was removed from the intersection of Seventeenth and Wynkoop terminated at Wynkoop Street. The intersection of these two streets, as shown by the evidence, is congested with traffic and the traffic naturally will increase as the population of the city increases.

Two main questions are presented for determination in this case: First, has the Railroad Company any right to occupy Wynkoop Street for such purposes; and, second, if it has such right to occupy Wynkoop Street, did the City in the exercise of its police power have the right to require the company to discontinue the use of this intersection and employ other means at its command for carrying on its business. As to these two questions, the argument of plaintiff in error and the argument of defendant in error are directed.

CONTENTIONS OF PLAINTIFF IN ERROR.

1. It claims it has the authority by virtue of legislative enactment to occupy the street, that the charter of the Denver and Rio Grande was obtained from the territory and that it has implied authority to construct a railroad on any street or streets in Denver.

2. That the ordinance of 1871, granted a franchise to the company to occupy Wynkoop Street and that the exercise of the power by the City Council of Denver was legal.

3. That by Act of Congress of 1872, the incorporation of the railroad company was ratified, which ratification included the franchise which it claimed it had from the Territory of Colorado and from the City of Denver, and that this amounted to a congressional grant to occupy the street.

4. It claims that by subsequent ratification by ordinances of the alleged franchise of 1871, the Railroad Company has been again granted the right to occupy the street by the Council of the City of Denver, these ordinances having been adopted in 1875 and 1878.

5. It claims that the City by its actions is estopped to deny the right of the Railroad Company to occupy the streets and that by its actions and conduct has consented to such occupancy.

6. That the attempted exercise of this police power is an interference with interstate commerce.

7. That the ordinance of 1914 requiring the Railroad Company to discontinue the use of the intersection of Wynkoop and Seventeenth streets is an unreasonable exercise of the police power.

CONTENTIONS OF DEFENDANTS IN ERROR.

1. That there was no Territorial legislative authority to the company to occupy Wynkoop Street, either in express terms or by implication.

2. That the ordinance of 1871 was *ultra vires* and void (a) because by its charter the City Council had no power to grant rights of way or franchises to railroads to occupy its streets, and (b) because the Act of Congress of March 2, 1867 expressly prohibited the granting of special privileges and franchises by the legislature.

3. That the Railroad Company acquired no franchise and no right to occupy the streets by reason of the Act of Congress of 1872 and acts amendatory thereof, and that said Acts of Congress were not a ratification of the occupancy of the street but only legalized the company's corporate existence and gave it the right of way across the public domain between certain terminal points.

4. Subsequent ordinances did not and could not have ratified the *ultra vires* or void act of granting the right of way by the ordinance of 1871.

5. The City is not estopped to deny the right of the Railroad Company to occupy the streets because (a) plaintiff does not set up estoppel in its pleadings, nor is there evidence to establish facts from which estoppel can be claimed; (b) Estoppel cannot be relied upon against the City where the attempted authority for the right of occupancy is void, and cannot be relied upon in any case against the City unless exceptional circumstances exist, and which did not exist in this case.

6. The ordinance of 1871 under which the Railroad Company claims its right to occupy the street was derived, imposed a condition precedent before the Railroad Company could occupy streets with sidetracks, viz., that the railroad must first acquire the ownership of the land adjacent to the street and this condition precedent was never complied with.

7. That the reasonable exercise of the police power which only affects switching and does not affect main lines or even sidetracks, is not an interference with interstate commerce.

8. Regardless of the Railway Company's right to occupy the street in question the City had the right, under the exercise of its police power to pass the ordinance requiring the sidetracks to be removed.

The above contentions of the respective parties include all of the matters necessary to be considered in this case. Plaintiff in error has in addition to these contentions gone into a lot of matters which are interesting historically but in no way germane to the issues involved. Since the occupancy of Wynkoop Street by the original company, The Rio Grande Railway Company, there have been certain mortgages and successions of interest, the railroad now being owned by the present plaintiff in error, but there is no contention that these successions of interest in any manner affect the controversy, and the subject will therefore be treated the same as if the original claimant was the only one involved.

BRIEF OF THE ARGUMENT.

I.

DID THE RAILWAY COMPANY HAVE LEGISLATIVE AUTHORITY TO OCCUPY THIS STREET?

This company was organized under the general laws of the Territory. It was not given a special charter by the territorial legislature, and whether the legislature at that time had authority to give a special charter, or not, is not important for the reason that no such charter was ever granted to the Railroad Company.

The incorporation laws of the Territory under which this company filed its articles of incorporation are found at Chapter 18, page 117, of the Session Laws of Colorado of 1868. This act provides that any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, construct railroads, telegraph lines, etc., may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, duplicate certificates in writing, in which shall be stated the corporate name of the company, the business for which the company shall be incorporated, the amount of the capital stock of said company, the term of its existence not to exceed twenty years, the number of shares of stock, etc., etc.

Section 2 of the act provides that when the certificates shall have been filed that the persons who shall have signed and acknowledged the same shall be a body politic and corporate in fact and in name and by that name shall have succession, and shall

be capable of being sued in any court of law or equity in the Territory and shall be capable in law of acquiring by purchase, preemption, donation or otherwise, and holding or conveying by deed or otherwise, any real or personal estate whatever which may be necessary to enable the said company to carry on their operations named in the certificate.

Pursuant to this act of the legislature, the company filed its certificate of incorporation (Transcript of Record, pp. 82-85). The certificate of incorporation states that the object of the company is to locate and construct railroad lines, to acquire, improve and dispose of lands, and describes the route of its railroad, and as far as Denver is concerned, the description is as follows:

“The route of this railway is described as follows: Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte River, * * *”

It will be seen that the Railroad Company had no grant of any privileges by the Territory of Colorado, the legislature only attempting to confer the right upon individuals to associate themselves into a body corporate for the purpose of carrying out the businesses or operations named in the legislative act. There is no express power in the legislative act authorizing railroad companies that may be formed to occupy the streets of cities; there is no language in the act from which such right can be implied. Neither can the certificate of incorporation as filed by the company in any manner enlarge the powers that were granted by the legislative act; neither did the company by its certificate claim the right to oc-

occupy any street that had been dedicated to the public and if it had assumed by the certificate any such right, it would have been without authority. The law no doubt contemplated that railroad tracks would have to be built, that certain rights of way would have to be acquired, that condemnation suits would have to be brought in order that the company might acquire such property as was necessary for it to own in the conduct of its business, but there was no express authority given by the legislature to the use of the streets or highways in any of the municipalities of the Territory, neither is there any general language in the statute, which simply permits three or four individuals to associate themselves together under a common name, which by necessary implication or any implication, confers the right to occupy streets or highways.

The first question, therefore, that presents itself, is as to what power a corporation acquires under general laws such as we have referred to, to occupy the streets of a municipality that have been dedicated to public uses, and where the fee in the streets is vested in the municipality in trust for the public generally.

“The right to place rails upon a road or street and use it in the operation of a railroad, can only be granted expressly or by necessary implication.”

Elliott on Roads and Streets, Vol. 2, Sec. 1045, 3rd ed.

“A general grant to construct a railroad between certain termini without prescribing its exact course or line, was considered to authorize the crossing of public highways, be-

cause this was necessary in order to execute the grant, but was not regarded as *prima facie* conferring the power to occupy highways longitudinally.”

Dillon on Mun. Corp., Vol. 3, Sec. 1233, 5th ed.

Elliott on Roads and Streets, Vol. 1, Sec. 248.

Elliott on Roads and Streets, Section 248, *supra*, states:

“The right to take longitudinally is essentially different from the right of crossing, and the rules governing the two classes of cases as appears from the authorities we have referred to are radically different.”

In the case of *Chicago v. Danville & Vincennes R. R. Company*, 121 Ill. 176, the State of Illinois had granted a special charter to the company to construct a railroad from Vincennes, Indiana, to, and into, the City of Chicago, and to locate said road through its whole length with the width of one hundred feet, and to appropriate land for that purpose. The Court, by Mr. Justice Sheldon, on page 182 of the opinion says:

“The occupation of the street of a City with a railroad track is a very serious concern as regards the public and property owners upon the street, and a permission which is set up to occupy a public street should plainly appear, and not be left to be derived by doubtful implication from the generality of the language which does not unmistakably manifest the intention to give such permission.”

And in concluding the opinion, on page 186, the Court says:

“By no reasonable or fair interpretation can it be held that the grant of authority to run their road through the town operated as a grant of the use of the streets, or either of them, to the company for the purpose.”

In the case just referred to, the company was acting under a special charter. The implication to occupy streets would be stronger in the Chicago case than in the present case. Here the articles of incorporation provided that it should commence at Denver and proceed to other points. In the Chicago case it provided that the tracks should go to the City of Chicago and into the City of Chicago.

“In Great Britain legislative authority or sanction is necessary to enable the town or others to occupy the streets or highways for the purpose of horse or street railways, and such is doubtless the law in this country.”

Dillon on Mun. Corp., Vol. 3, Sec. 1237, 5th ed.

In the case of *Daly v. Georgia So. R. R. Co.*, et al., 80 Ga. 793, it was contended on behalf of the railroad company that the general power given it by the City Charter authorizing it to build a railroad from Macon to Homersville, and to enter the City of Macon, authorized it to use the streets of the City of Macon. On this branch of the case, the Court at page 800 of the opinion says:

“Counsel further contended that this power was granted in the charter of the railroad company; first, that the charter authorized the company to build a railroad from

Macon to Homersville; secondly, that it granted to this company all the rights and privileges of the Central Railroad & Banking Company. They claimed that one of the rights and privileges granted to the Central Railroad & Banking Company, by the act of 1850, was to enter the City of Macon. We have carefully read these charters relied on by the learned counsel, and can find nothing contained in them granting, either expressly or by implication, the right to lay their tracks longitudinally in the streets. Counsel relies upon the case of *Hazelhurst v. Freeman*, 52 Ga. 244, where this Court held that the Macon & Brunswick Railroad, under its charter and amendments thereto, authorizing it to construct a railroad from the City of Brunswick to the City of Macon, and clothing it with the rights, privileges and immunities of the Central Railroad, was authorized to construct its road into the City of Macon, and was not limited to the City lines; and that a private citizen could not enjoin it from appropriating ground for the location of its track because of its want of authority to come within the City lines. We do not doubt the correctness of that decision, nor do we doubt the right of this railroad company, under its charter, to enter the City of Macon; *but we hold that when it does enter, it must enter according to law. It must buy or condemn its right of way like individuals or other corporations, or it must have the authority of the legislature before it can appropriate streets of the City which have been set apart by the City for the use of the public.*" (Italics ours.)

It has been frequently held that the grant of a right to a railroad company to the use of a street

for its railroad is a franchise, but as said by McQuillin, at Section 1617 of his work on Municipal Corporations:

“The question as to what constitutes a franchise is of little practical importance, however, in so far as it relates to whether a grant by a municipality to a public service company to use the streets * * * is a franchise.”

And the authority follows by stating that insofar as the relation between a company and the State or a municipality is concerned, it is not necessary to make any distinction; and that in nearly every jurisdiction such a grant to a company is a franchise.

At Section 1620 the author further states:

“The rule must be considered settled that no person can acquire the right to make a special or exceptional use of the public highway, not common to all citizens of the State, except by grant from the sovereign power.”

See *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242;

Purnell v. McLane, 98 Md. 589;

McEniry v. Tri-City R. R. Co., (Ill.), 98 N. E. 227.

At pages 51 to 53 of its brief, plaintiff in error contends that Congress, by the act of May 23, 1844, gave the territorial legislature full power over Denver townsite as a whole and that the paramount and dominant control of the streets was in the legislature and after citing some cases, among which is the *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, coun-

sel conclude that the territorial legislature, with the assent of Congress, had the power to authorize the building of a railroad in the street, but this is as far as counsel proceeded with their argument. They do not show that the legislature ever exercised this power or ever attempted to exercise the power, and it is fully shown that even if the legislature did have the power (which it did not have, as we shall show hereafter) that nevertheless, having never attempted to grant the power to the Railroad Company, the company received no right to occupy the streets of the City.

II.

ORDINANCE OF 1871 WAS *ULTRA VIRES* AND VOID.

The ordinance of 1871 was *ultra vires* and void, because—

(a) By its charter, the City Council had no power to grant rights of way or franchises to railroads; and

(b) The Act of Congress of March 2, 1867, expressly prohibited the granting of such franchises.

The ordinance of 1871 was *ultra vires* and void. Since long prior to the matters involved in this case, the City of Denver was operating under a special charter from the legislature. It was not governed by the general laws either of the territory or the State, after the territory became a State. At the time the ordinance of 1871 was attempted to be passed by the City, the City was operating under the charter that had been granted by the territorial leg-

islature of 1866 and the powers of the City were enumerated in this charter. It was not given power to grant franchises, licenses or rights of way in its streets; neither was it given any powers from which this right could be implied, as was given by the subsequent charter of the City passed in 1874. The only powers that the City of Denver had under this charter of 1866 were the powers granted it by the legislature. It had the power to

“open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, mains, alleys, sidewalks, drains and sewers.”

“remove all obstructions therefrom.”

“prevent and remove all encroachments into or upon all or any streets.”

“make all ordinances necessary for carrying into effect the powers specified in this act, not repugnant to nor inconsistent with the Constitution of the United States or the organic act of this territory.”

Mr. Dillon, in his work on *Municipal Corporations*, Vol. 1, § 33, 5th ed., says:

“Like other corporations, municipal corporations must, with us, be created by statute. They possess no powers or franchises not conferred upon them, either expressly or by fair implication, by the law which creates them, or by other statutes applicable to them.”

Again, at Sec. 237, this author says:

“Of every municipal corporation, the charter or statute by which it is created, is the organic act. Neither the corporation nor its officers can do any act, or make any contract,

or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations."

Section 239: "The extent of the powers of municipalities, whether express, implied or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or fair, reasonable, substantial doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee."

The rule with reference to granting the right to an ordinary railroad to occupy streets is more strictly construed than are the powers granted to municipalities, concerning other street uses.

"The power to grant franchises to use the streets resides primarily in the legislature, and it has the power to grant to a public service corporation the right to use streets without compensation to or consent of municipalities, unless the state constitution otherwise provides. But it cannot authorize the holder of such franchise to interfere with the property rights of an abutter without just compensation."

McQuillin on Mun. Corp., Vol. 4, Sec. 1623.

At Section 1624 the same author says:

“It is undisputed that a municipal corporation has no inherent power to grant an individual or corporation a franchise or license to use the streets. * * * Its authority is limited to that conferred upon it expressly or by implication by the legislature.”

See *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673, and other cases cited under notes 85 and 86 of this section.

“Streets and highways are under the exclusive control of the General Assembly. It matters not if the fee in the streets is in the city, it has no authority to control or grant rights and privileges thereto or thereon, unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter of the general statutes of the state. A distinction has been drawn between a railway operated by horse and steam power, and whether the defendant may authorize the former and not the latter is not in this case, and we only allude thereto lest we may be misunderstood.”

Stanley v. City of Davenport, 54 Ia. 463, 37 Am. Rep. 216, 218.

In the case of *Ruttles v. City of Covington*, 10 Ky. L. 766, it was held that a provision of the City charter that the council shall have

“exclusive control of the streets, sidewalks, lanes, alleys, market places and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair,”

does not confer upon the council power to grant a railroad the right of way over and along its public streets, as that would be an appropriation or use of the streets for a purpose not contemplated when the charter was granted.

In the case of *City of Stillwater v. St. Paul & M. S. R. Co.*, 86 N. W. 103 (Minn.), the legislature had delegated authority to municipalities having a population of 3,000 or more, to permit the use of their streets for street railways, but in villages under 3,000 population only general powers were given with respect to streets. The latter were given power to lay out, open, change, widen, extend, prevent encumbering and govern the streets of such villages. In determining whether these general powers gave to villages the implied power to grant the use of streets to street railway companies, the Court, in concluding its opinion, on page 104, says:

“If it was the intention of the legislature to grant so important a power to such villages, it would seem reasonable to believe that it would have done so in express terms, as was the case of villages having a population of over 3,000 and the cities of the state. Again, if such was the intention, why should the legislature grant the power to such villages in express terms to erect and maintain water works and light plants, and leave the power to grant the use of streets to street railways to be implied from the general authority to establish and control streets? Our conclusion is that the legislature did not intend to and did not give to such villages the power to grant street railway franchises for a definite term.” (Citing *People R. Co. v. Memphis R. Co.*, 10 Wall. 38, 19 L. Ed. 844; *Davis v. Mayor*, 14 N. Y. 506, 67 Am. Dec. 186, and notes.)

Plaintiff in error admits that the charter of 1866 did not confer the power upon the City to grant franchises in streets, but contends on page 57 of its brief that inasmuch as the council had the power to remove obstructions from the streets, it had implied power to permit as well as to prevent. By the same canon of reasoning, they could also say that the power granted to cities to prevent nuisances, the power to prevent crime, the power to preserve the public health, would also carry with it the power to permit nuisances, to permit crime, and to violate the rules of health. There is no such rule laid down by any authorities.

Plaintiff in error also says on page 58 of its brief that the general Towns and Cities act of 1868 gave municipal corporations the power to direct and compel the laying and construction of railroad tracks, etc. It is a well-settled rule of law in Colorado that a general act of the legislature, unless express provisions or references are made therein, does not alter or amend a special act of the legislature. There are a great many cases in Colorado which hold that Denver and other cities acting under a special charter are not governed by the general law. It is only necessary to make reference to a few of such cases.

Colorado Constitution, Art. 14, Sec. 14.

Brown v. City of Denver, 7 Colo. 305.

People v. Jobs, 7 Colo. 475.

Darrow v. People, 8 Colo. 426.

People v. Londoner, 13 Colo. 303.

Re Extension of Boundaries of Denver, 18
Colo. 288.

City of Denver v. Coulehan, 20 Colo. 471.

Re House Resolution relating to H. B. 116,
12 Colo. 289.

In 1876, a short time after this attempt by the City of Denver to grant a franchise to this company, our Constitution was adopted, and by an enabling act of Congress, Colorado was made a sovereign state, and thereafter its legislature had plenary powers to legislate with reference to streets and cities in the state. It also had the right to delegate such power to municipal corporations, but prior to the adoption of our Constitution, the legislature did not have these plenary powers. It was limited by the act of Congress of March 2, 1867, and our Supreme Court, having construed that provision of Congress, we feel it unnecessary to analyze the cases cited by counsel in this behalf.

Denver & Swansea R. Co. v. Denver City R.
Co., 2 Colo. 673.

Ward v. Colo., etc. Co., 22 Colo. App. 347.

III.

DID THE ACT OF CONGRESS OF 1872 GRANT ANY POWERS
TO THE RAILROAD COMPANY.

At page 46, et seq., of its brief, plaintiff in error claims that the Railroad Company received a right in Wynkoop Street from the United States, that Congress had the power to grant rights of way to railroad companies over public lands, that it had the power to incorporate the railroad companies, and that it also had the power to authorize territorial legislatures to grant franchises to railroad companies and power to ratify things done under the acts of the territorial legislature. They then say on page 50 that Congress exercised this power to grant

a right of way by the act of June 8, 1872, 17 U. S. Stat. at Large, 339, by which Congress granted to the railroad a right of way over the public domain and that by the same act it ratified and confirmed from the date of its incorporation the charter granted to the railroad.

The act of Congress of 1872 did nothing more than to validate the attempted act of the territorial legislature in providing for the incorporation of railroad companies. At the time the D. & R. G. Railroad Company was incorporated in 1870, Congress had not given to the territory the power to provide by statute or otherwise for the incorporation of railroad companies. Nevertheless the legislature had attempted by general laws to do this, and pursuant to such laws, the company had filed its certificate of incorporation, designating the location of its tracks and enumerating the powers that it intended to exercise, and in order to legalize its corporate powers and to have its right of way over the public domain made certain, the company had a bill introduced in Congress to accomplish these purposes. The case of *D. & R. G. v. Alling*, 99 U. S. 463, only held that by this ratification of Congress the company was placed in the same status that it would have been in, had the legislature had the power to permit the incorporation of the company. Its charter referred to in the decision was its articles of incorporation, and "the routes designated in the charter of the company" were the routes designated in these articles of incorporation. Now, what routes were designated? Referring to the transcript of the record, page 82, we find:

“The route of this railway is described as follows: Commencing at Denver, Colorado Territory (here follows a description of the route after leaving Denver until a point on the Arkansas is reached; then the description proceeds); thence up the valley of the Arkansas River to a point at or near Canon City; thence continuing up the valley of the Arkansas through the big canon of the same to a point at or near the mouth of the South Arkansas River. * * *”

The question for determination in this Alling case was as to the right of way through the Royal Gorge, and as to whether or not this ratifying act of Congress gave to the D. & R. G. Co. such right, hence, the reference in the decision to the routes of the company. All that the act did was to confirm to the company the powers attempted to be conferred by the laws of Colorado to said company. Congress did not attempt to authorize the company to take private property or to take the streets of Denver which Denver has acquired by congressional grant; and had it attempted to do so, it would have been violating the Fifth Amendment of the Constitution of the United States. And, furthermore, the act of Congress did not, by express grant, attempt to vest in the company a right of way to the street in question, neither is there a fair implication that such was its intention, and in determining the rights of the company in Wynkoop Street under this act, the same rules of construction govern in determining whether or not a right of way is to be implied as would be taken into consideration with reference to a state legislative grant.

Furthermore, it was not the intention of Congress, when it passed the act of 1872, to repeal its act of March, 1867, which expressly prohibited the granting of special privileges and franchises by the legislature, and if such had been the intention of Congress, it is fair to presume that it would have so expressed itself. It therefore follows that the act of Congress of 1872 did nothing more than grant a right of way to the company over the public domain, over which Congress had control, and to validate their charter as a corporation, dating from the time of the filing of the certificate of incorporation.

The ordinance of 1871 was not only *ultra vires*, but it was also in violation of the act of Congress of March 2, 1867, which expressly prohibited the granting of such franchises. This was expressly determined by the Supreme Court of Colorado in the case of *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673. In that case the City council of Denver had attempted to grant a right of way or franchise to H. G. Bond, Miers Fisher and Ruter, to build, operate and maintain a railway for street railway cars, and the Court in that case said, at page 681:

“We must now inquire what powers the government of the United States had invested the territorial legislature with to grant franchises and privileges. By the act of Congress of March 2, 1867, the territorial legislature is prohibited from granting private ‘charters or special privileges,’ but may, by general incorporation acts, provide for incorporation of bodies corporate for mining, manufacturing and other industrial pursuits; and by the act of June 10, 1872, the territorial legislature may, by general laws, permit corporations to

be formed for the construction or operation of railroads and other purposes not necessary to mention.

“The ordinance in question, if within the powers conferred upon the City council by the charter of February 9, 1866, conferred a special privilege upon the persons therein mentioned and their assignees, the Denver & Swansea Railway Company, and in this respect was in contravention of the spirit of the congressional act of March 2, 1867, inasmuch as the power to grant such privileges, if ever possessed by the territorial legislature, had, before the passage of the ordinance under consideration, been taken away by the last mentioned act. The City council was the creature of the territorial legislature, and we think could not, after the passage of the act of March 2, exercise a greater power in this respect than the legislature which created it. If we are right in this conclusion, the ordinance, insofar as it attempted to confer an especial privilege, was void. We might rest our decision here, but desire to go further and place our decision upon other grounds as well.

“On the 13th day of February, 1874, the charter of the City of Denver was amended, and in addition to the powers herein before enumerated, the amended charter conferred upon the City council power ‘to regulate the running of horse railway cars, or cars propelled by dummy engines, the laying down of tracks for the same, the transportation of passengers thereon, and the form of rail to be used.’

“If it is contended that the action of the City council under the charter of 1874, in adopting the ordinance of March 5, at that time affirmed the right of the Denver & Swansea

Railway Company in the streets in question, and thereby gave the defendants the rights which they claim to exercise, that position cannot be maintained, for it is apparent that the territorial legislature had not power, after the passage of the Congressional act of March 2, 1867, to confer an especial privilege, and, of course, could not confer the power upon the City council to grant such especial privilege.

“That the ordinance in question, taken in all its parts, undertook to confer an especial privilege and franchise, there is not the shadow of doubt. * * *

“Upon authority we hold that the ordinance and resolutions in the case at bar were void, and conferred no authority whatever upon the defendant, and cannot be invoked to give them protection. What was the legal character of the acts of the defendants in the construction of a railway in Holliday and Twenty-third Streets? Upon the established facts we must say they created a public nuisance. If authorized by law, their acts might have been justified, no matter how much inconvenience to the public they might have occasioned, but being without right, no matter how little inconvenience this permanent appropriation of a part of the street may occasion, they cannot defend themselves from the charge of nuisance. The authorities for this position are constant and uniform, and leave no doubt on the question.”

The cases cited by plaintiff in error on pages 41 to 45 of its brief, to the point that a charter describing a line of railroad commencing at a city, by implication includes the right to reach some convenient point in the city are not applicable in the

present case. None of the cases cited, except the case of *Commonwealth v. Erie & Northeastern Railroad Co.*, 27 Penn. St. 339, involve the question of occupying public streets and highways. The case just referred to did involve the question of occupying a public highway, and the Court in that case stated that the granting of the right to make a railroad by constructing a line between two designated points necessarily implied the right to run upon, along or across all the streets or roads which lie in the course of such line. It is not questioned that the Railroad Company had the power to come into the City of Denver. The only question is as to how it should enter, whether it should enter over one of the public highways of the City, or whether it should acquire its right over private lands, or whether it should acquire them through some act of the legislature or the City authorities.

IV.

RATIFICATION BY SUBSEQUENT ORDINANCES.

On pages 59 and 60 of its brief, the plaintiff in error contends that even if the ordinance of 1871 was void it was ratified by subsequent ordinances passed in 1875 and 1878. The ordinance of 1878, as shown in the transcript of record, folio 143, did not attempt to give any rights in Wynkoop Streets, but recited that

“in addition to the privileges heretofore given to the Denver and Rio Grande Railway Company with respect to the use of certain streets in said City, the Company is hereby granted certain other street privileges.”

Therefore the only ordinance which is necessary to consider is the ordinance of 1875. This was a certain general ordinance which attempted to confirm certain rights of way to various companies. It was entitled, "An ordinance concerning the rights of way and other privileges *hertofore* granted to railroads and other corporations in the City of Denver" (record, fol. 143). The ordinance did not amount to an original grant of privileges covered by the ordinance of 1871. It didn't even refer to the ordinance of 1871 or to any right granted in Wynkoop Street, neither is this ordinance plead in the bill of complaint.

"A subsequent ratification cannot make valid an unlawful act without municipal authority."

Dillon on Municipal Corporations, 5th Edition, Section 797.

But there is another controlling reason why the ordinance of 1875 could not give to the railroad company any rights to the use of the streets, and that is on account of the act of Congress of 1867 (6th Session 105), which provided that the territorial legislation be prohibited from granting "private charters or special privileges," and the Supreme Court of Colorado, in the case of D. & S. Ry. Company v. D. City Ry. Co., 2 Colo. 673, said:

"That an ordinance passed in 1873 which attempted to grant a similar privilege to a railroad company was in contravention of the spirit of this congressional act of March 2, 1867, inasmuch as the power, if ever possessed by the territorial legislature, had, before the passage of the ordinance under consideration,

been taken away by the last-mentioned act. The City council was the creature of the territorial legislature, and we think could not, after the passage of the act of March 2nd, exercise a greater power in this respect than the legislature which created it."

It will also be noted that in the ordinance of 1871, attempting to grant a franchise to the Railway Company, no period of time was fixed as to how long the franchise should continue. It was, therefore, terminable at the will of the power granting it, or it was limited by the life of the corporation, as determined by its charter. As has been said before, the company had no specific charter from the territory, but simply filed its certificate of incorporation under general laws, and the general law with reference to corporations limited the term of existence of such corporation to twenty years (Chapter 18, Sec. 1, Revised Statutes of Colorado, 1868).

True the company when it filed its certificate of incorporation stated therein that the term of corporate existence of said company should be fifty years, from the filing of this certificate (record, page 85). But this was in direct violation of the section of the law authorizing its corporate existence. When later Congress ratified the charter of the Railway Company, it ratified the act of the legislature under which the company was organized; it made valid something that was not valid before; it made valid the general law under which the corporation was incorporated. But it did not make valid a provision in the certificate of incorporation which claimed an existence beyond that provided for in the territorial statute. It, therefore, follows that

individual rights this company might acquire by virtue of the ordinances of the City and County of Denver, attempting to give it a franchise, are limited by the general provisions of law, and that even if the company ever did have a right in Wynkoop Street, the right expired when the term of the existence of the company expired. Toll Road Company v. People, 22 Colo. 429.

V.

ESTOPPEL AND CONSENT.

On page 60, et seq., of its brief, plaintiff in error contends that even though the Railway Company had not received authority from the City to occupy its streets with a railway, yet by its conduct in relation to the railroad and the occupation of the street by the railroad, the City is estopped to deny the right of the railroad. There is no doubt that there are cases in which the doctrine of equitable estoppel may be applied to municipal corporations, but the present case is not such a case. If the City had not power to authorize the use of its streets for private purposes, by ordinance, it certainly could not accomplish the same thing by conduct. The power to ratify a contract, either by estoppel or otherwise, presupposes the power to make it in the first instance, and a contract which is invalid, because not authorized by law cannot be made valid retroactively by any subsequent action of the authorities of a City, and a liability be thereby fastened upon the corporation. As was said in the case of Union Depot Co. v. St. Louis. 76 Mo. 393:

“The rule is thus given by Bigelow: ‘If the act undertaken was in and of itself *ultra vires* of the corporation, no act of the body can have the effect to estop it to allege its want of power to do what was undertaken.’”

See also:

Scoville v. Thayer, 105 U. S. 143;

Thomas v. Railroad, 118 U. S. 317.

In the last cited case it was said:

“We know of no well-considered case where a corporation, which is a party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, can be compelled to do so.

“As the City had no power to authorize the use of its streets for private purposes by ordinance, it certainly cannot do so by estoppel.”

In City of Ashland v. Chicago & N. W. R. Co., 105 Wis. 398, the Court said:

“We think it sufficiently appears that whatever was done by the companies was done in reliance upon the alleged contract to vacate, and, that having been made without even color of right, it furnished no proper basis upon which to found an estoppel.”

In State ex rel. v. Town of Munroe, 82 Pac. 888, (Wash.) the Court says:

“Nor is there any foundation for the contention that the respondents are estopped to question the validity of a franchise claimed by the appellant. The appellant acquired its franchise from public officers whose powers are limited and defined by law. To permit the plea of ratification to prevail against the de-

fense of *ultra vires* in such cases would wholly deprive the public of the safeguards which the law intended for their protection in limiting and defining the powers of their public servants. As said by this Court in *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063:

“ ‘The power to ratify a particular contract pre-supposes the power to make it in the first instance; and, if it is such that it could not be made originally, except in a certain prescribed mode, where that mode is disregarded, the power to ratify does not exist. A contract which is invalid because not authorized by law cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon the corporation.’ ”

In *State v. Pullman*, 23 Wash. 583, 83 Pac. 265, 83 Am. St. Rep. 836, the Court quoted with approval from 2 Herman on Estoppel, p. 1365, as follows:

“ ‘The true principle in such cases is well settled that one cannot do indirectly what cannot be done directly, and, where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts.’ In that case the Court further said:

“ ‘It is claimed, however, by the appellant, that having received the benefits of the contract which the City entered into, it ought to be estopped from denying its validity; also, that it had ratified the contract by receiving the benefits. It is well established that the

power to ratify is co-extensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified. There has been a conflict of opinion on some branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of *ultra vires*, and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract.' See also Dillon on Municipal Corporations, Sec. 457. *City of Detroit v. Detroit Ry. Co.* (C. C.) 60 Fed. 161."

Mr. McQuillin in his work on Corporations, at Section 1687, says:

"That if a contract is entered into by a municipality without observing mandatory legal requirements, no recovery can be had against the municipality because of ratification, waiver, or on the ground of estoppel; and also, that this same principle applies to the granting of a franchise. And furthermore, that the fact that the railroad company might have expended large sums of money on the faith of the franchise to use the street, that this does not estop the municipality."

As was said in the case of *Arnott v. Spokane*, 6 Wash. 442:

"A contract which is invalid, because not authorized by law, cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon corporations."

There is another matter that may be urged in the same connection. The Supreme Court of Colorado, following the general rule has consistently held that for an estoppel to be available, either as a defense or as grounds for recovery in a complaint, that the estoppel must not only be specially pleaded, but must be established conclusively by the evidence. And to establish estoppel *in pais* there are certain essential elements that must be shown, and unless all of the elements are both plead and established, no title or right can be considered as having been established by estoppel.

The first case in which this principle is laid down is the case of *Patterson v. Hitchcock*, 3 Colo., 536; and following this decision, in the case of *Griffith v. Wright*, 6 Colo. 248, the Court says:

“In the case of *Patterson v. Hitchcock*, 3 Colo. 536, this Court, upon a review of the authorities, held the following to be the essential elements of an estoppel by conduct:

“First. There must have been a representation or concealment of material facts.

“Second. The representation must have been made with knowledge of the facts, unless the party making the representation was bound to know the facts, or ignorance of them was the result of gross negligence.

“Third. The party to whom it was made must have been ignorant of the truth of the matter.

“Fourth. It must have been made with the intention that the other party should act upon it; but gross and culpable negligence upon the part of the party sought to be estopped, the effect of which is to make a fraud on the party setting up the estoppel, supplies the place of intent.

“Fifth. The other party must have been induced to act upon it.”
And in the case of *Chicago v. Hayes*, 49 Colo. 343, the Court said:

“It is a settled law of this state that to establish an estoppel *in pais* it must be specially pleaded.”

Chicago v. Hayes, 49 Colo. 343.

And it was held in the case of *De Votie et al. v. McGerr*, 15 Colo. 467, that an estoppel *in pais* cannot be proved under the general or specific denial provided by the code, but must be specially pleaded as new matter in order to be available as a defense.

In the case of *Leschen & Sons R. Co. v. Craig et al.*, 18 Colo. App. 353, it was held that in a replevin action where it was claimed that the plaintiff was estopped to assert ownership of the property as against the execution creditors because the execution defendants were permitted to hold themselves out as owners so as to justify said creditors in believing that they were the owners that such defense could not be relied upon unless it was pleaded.

It is also held in *Rockwell v. Coffey*, 20 Colo. 397, that where the title is known to both parties, or both have the same means of ascertaining the truth, that there is no estoppel.

Mr. Bigelow, in his work on estoppel, Fifth Edition, on page 709, says that in order to establish estoppel *in pais* there are five elements necessary to be shown. These elements, as laid down by Mr. Bigelow, are substantially the same as have been recognized by the Supreme Court of the State of Colorado.

Estoppel is not set up either in the complaint of the plaintiff in error herein nor in its reply to the answer. There are certain general allegations of waiver, certain allegations of use of the street in question for a long length of time, but nothing alleged to comply with the stringent rules that are required by the Courts to be pleaded and established in order that the plea of estoppel may be maintained.

Counsel have referred to the case of *Colorado Springs v. C. & S. Ry. Co.*, 38 Colo. 107, in this connection. That case, however, does not meet the question here presented. That was a case in which an ordinance had been adopted granting the right of way to the railway company in a certain street in Colorado Springs. The validity of the ordinance was not questioned. The power of the council to grant it was not questioned. The only claim was that the street was being occupied by more tracks than under the terms of the ordinance would be permitted reasonably. And the Court's reference to the length of time that the street had been occupied by the railway was with reference to the construction that had been placed upon the ordinance. And the Court, as page 112, says:

"The construction we have put upon the ordinance is one which appellant has placed upon it for about eighteen years."

Title was not claimed in that case by estoppel, and the case is not an authority to establish counsel's contention in the present case. It therefore follows that the claims of the defendant in error, based upon estoppel, absolutely fall. It was not pleaded or attempted to be shown in evidence that there was a representation or concealment of material facts.

Second, it was not shown that the party to whom it was made was ignorant of the truth of the matter.

Third, it was not shown that representations were made by the City of Denver, or its representative, with the intention that the company should act upon such representations. Neither was it shown that the city or its representatives in any manner sought to induce the company to act upon any representations. It therefore follows that a number of the essential elements to establish estoppel were lacking both in the pleadings and in the proof, and we think it unnecessary to pursue this subject to any greater length.

VI.

CONDITIONS PRECEDENT.

Let it be assumed that the City council had the power in 1871 to grant a franchise to the Railway Company to build its railway through Wynkoop Street, and it is not contended that subsequent ordinances did anything more than to ratify that which had been done by the City council when it adopted the ordinance of 1871. Let us examine the ordinance, with this assumption, and see what rights were granted by it. The ordinance contains certain provisions and conditions.

Section 2 reads as follows:

“To build their necessary depots, turn-outs, turntables, water tanks and side tracks, on the land *now owned or that may be acquired* by the said company; and in the construction

to use the alleys and streets for said purpose *when all of the lots on both sides of said streets are owned by said company*" (Record, pp. 17, 18).

It cannot be denied that this section contains what is known as a condition precedent; and that the ordinance, to be operative or effective, or convey the grant supposed to be therein contained, must first be complied with.

Examining the record herein to ascertain if the plaintiff has acquired at any time the title to all the lots on both sides of Wynkoop Street where said track is land, we find that the northeast corner of Eighteenth Street is owned by the Littleton Creamery Company; the east corner of Eighteenth Street is owned by the McPhee & McGinnity Lumber Company; the northwest corner of Eighteenth Street is owned by the Union Depot; and the west corner is owned by J. S. Brown Bros. Mercantile Company.

The east corner of Seventeenth Street and Wynkoop is owned by the Hendrie & Boldthoff Manufacturing Company; the south corner of Seventeenth Street is owned by the Eastabrook Mercantile Company; the north and west corners of Seventeenth Street are owned by the Union Depot; the east corner of Sixteenth and Wynkoop is owned by the Barteldes Seed Company; the south corner of Sixteenth Street by the C. S. Morey Mercantile Company.

All of this property abuts on Wynkoop Street, over which the railroad tracks of the plaintiff are laid and constructed.

In *Edward v. Pittsburg Junction R. R. Company*, 215, Pa. State Reports, 597, the plaintiff was the owner of a tract of land in the City of Pittsburg on which was erected a three-story house which had been occupied by the plaintiff and his family for 30 years. The complaint alleged that the company entered into the City of Pittsburgh with its railroad adjacent to the plaintiff's property under an ordinance of the City, in which was an express provision and condition of such occupancy that the railroad should not use its locomotive steam whistles as signals, and that bituminous coal should not be used for fuel on locomotives along the route; and the complaint alleged that the railroad violated those conditions embodied in the ordinance, and prayed that the railroad be enjoined from using its steam whistles, etc. At page 602, the Court says:

“A railroad company occupying a public street without authority by legislative grant in clear words, or by unavoidable implication, constitutes a public nuisance, and may be enjoined at the suit of a private citizen, specially injured: * * *

“These authorities establish that except for the ordinance giving the consent of the City of Pittsburgh, the acts of the defendant company would constitute a public nuisance which the complainant or any other citizen especially injured could require to be abated. But a consent upon *condition*, and the condition broken, is no consent at all. The breach makes the continued use as unlawful as if the condition had never been performed at all.”

From 1871 until about 1880 or 1881 the company operated and maintained its railway through Wynkoop Street to its passenger depot which was situated on Wynkoop and Nineteenth Street. In the year 1880 or 1881, the Union Depot was built, and the company's main line was changed from Wynkoop Street to the other side of the Union Depot, and from that time on it continued to use the Union Depot as its passenger depot, and to use the tracks on the other side of the Union Depot for operating its trains and for making up its trains, and for sidetrack purposes, and discontinued the use of Wynkoop Street depot and also the use of Wynkoop Street as a main line track. Since 1881 the Company has simply used the track on Wynkoop Street as a switch for the purpose of accommodating certain patrons that might ship over its road, and in order that said patrons might unload cars directly into their respective places of business. The Railroad Company has never acquired or sought to acquire a franchise other than the one claimed by this ordinance of 1871 from the City to use the street. It has never complied or attempted to comply with Section 2 of the ordinance which required it to become the owner of lots on both sides of the street before it could use the same for a sidetrack or switch. It has therefore failed to comply with this condition precedent to entitle it to use the street for purposes other than maintaining its track as a main line.

So even if the ordinance of 1871 did amount to a franchise on Wynkoop Street, or if it has been ratified as such by subsequent ordinances, or by the

Congress of the United States, it has never acquired the right to use this street as a place for standing its cars for switching or for drilling purposes, and when the road discontinued its use of the street for the operation of its railway it then became a pure licensee in the street; a tenant at will or by sufferance, and could be ejected by the City at any time.

VII AND VIII.

INTERSTATE COMMERCE AND THE POLICE POWER.

So far in this brief we have only discussed questions of the powers of the United States, of the state or territory and of the municipality, that is as to what rights the Railway Company has acquired to occupy the street in question. Under the discussion of this topic, we will assume for the purpose of argument that when ordinance No. 34 of the Series of 1914 was adopted by the City and County of Denver, requiring the company to remove its tracks, that the company had a valid franchise and was legally occupying the street.

The legislative body of a state or of a municipality has control over the streets as well as other public highways. The streets and highways are dedicated primarily for the use of the public generally; the legislature of the State has the right to delegate dominion over streets not inconsistent with the primary purpose for which they are intended to a city or town, but the power thus delegated to a City to permit the use of such streets for railway purposes is a power which cannot be alienated or surrendered or placed beyond police control, wherever that important power may be vested.

The nature of a railway company's business is such in the occupancy of a street that it is peculiarly brought within the scope of this police power. One of the leading authorities on the subject is the case of *Munn v. Illinois*, 94 U. S. 113, in which case the Court uses the following language:

“When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual, not affected by his relations to others, he might retain. ‘A body politic,’ as aptly defined in the preamble of the Constitution of Massachusetts, ‘is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.’ This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe v. R. B. Railroad Co.* 27 Vt. 143, 62 Am. Dec. 625), but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *Sic utere tuo ut alienum non laedas*. From this source comes the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 12 L. ed. 291, ‘are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.’ Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.”

Mr. Dillon in his work on municipal corporations, at Section 301, 5th Edition, says:

“Many of the powers exercised by municipalities fall within what is known as the police power of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like. These and other similar topics will be considered in appropriate places. But it may here be observed that every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled ‘Police Laws or Regulations.’ It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as

not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. These regulations rest upon the maxim, *Salus populi suprema est lex*. This power to restrain a private injurious use of property, is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, *Sic utere tuo ut alienum non laedas*."

And again at Section 1269 the author says:

"Although a franchise or privilege to use the City streets is, when accepted and acted upon, a contract which cannot be impaired as well as a vested property right which cannot be taken except by the power of eminent domain, these franchises and privileges are not exempt from the exercise of the police power of the state, either operating directly by legislative enactment or by delegation to the municipality. It is the general rule that the right to exercise the police power cannot be alienated, surrendered, or abridged either by the legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function without which the state would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the City streets for a public service, *the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers of the state, operating either through legislative enactment or municipal action*" (italics ours).

And, at Section 1270, says:

“The basis of the exercise of the police power is the protection of human life and the promotion of public convenience and welfare. Municipal regulations not having a fair relation to these objects are unreasonable, but when they fairly tend to promote these objects, they are generally sustained.”

It was said in the case of *Atlantic, etc., Ry. Co. v. Mayor, et al.*, 128 Ga. 293, that a regulation by a City requiring the Commercial Steam Railroad Company to change the location of its tracks in the street is a legitimate exercise of municipal police power when such regulation is reasonable and promotive of the general welfare and convenience of the City and its inhabitants.

Mr. McQuillin in his work on *Municipal Corporations*, at Section 1682, lays down this rule:

“In the control of street railroads reasonable rules may be laid down by the municipality to compel the removal of turnouts, the laying of switches, the construction of approaches to bridges, etc. So for the convenience and welfare of the public, a municipality may require the tracks of a railroad company to be shifted from one street to another, or from one part of the street to the other.”

It must be borne in mind that the City is not taking away from the Railway Company its right to maintain tracks in Denver. Another place has been provided for that purpose. It is only demanding of the company that for switching purposes it abandon the intersection of Seventeenth and Wynkoop Streets in order that the public safety may thereby be advanced. The track in question is laid directly in front of the Denver Union Depot, one of the busiest

streets in the City, and one of the most congested with traffic, and the ordinance does not deprive the Railway Company of any privilege, but merely puts it to a little inconvenience, that is, in order to use its switch tracks to accommodate a few of its patrons beyond the intersection of Wynkoop and Seventeenth Streets it has to avail itself of the right that it has to use the tracks of the Union Pacific Railway Company, and the tracks are not used as a main line, they are used simply for switching purposes in order that the cars may be allowed to stand until the patrons of the road unload their cars. This privilege, no doubt, is a convenience to the patrons of the road, but a great inconvenience to others who may have occasion to use the street.

Whatever rights the company acquired to the use of this street were acquired under the implied condition that it should be held subject to the reasonable and necessary exercise of the police power of the State either acting through legislative enactment or municipal action.

“New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880;

“St. Louis v. Western U. Teleg. Co., 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485;

“Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505;

“Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 16, 43 L. ed. 341, 348, 19 Sup. Ct. Rep. 77. Weage v. Chicago & W. I. R. Co., 227 Ill. 421, 425, 11 L. R. A. (N. S.) 589, 81 N. E. 424; Com. ex rel Bell Teleph. Co. v. Warwick, 185 Pa. 623, 40 Atl. 93; Com. v. Philadelphia, H. & P. R. Co. 23 Pa. Sup. Ct. 205.”

One of the leading cases decided by this Court with reference to the power of the State or a municipality to secure the safety of the highway is the case of the New York & N. E. R. Co. v. Bristol, 151 U. S., 556.

The Railroad Commission in the State of Connecticut under authority granted it by the State had abated a railway crossing of a public highway, and in the course of its opinion this Court said:

“It is likewise thoroughly established in this Court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.”

After referring to a number of cases decided by the Supreme Court of Connecticut this Court further proceeding says:

“We are asked upon the grounds above indicated to adjudge that the highest tribunal of the state in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the state of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

“But this Court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.”

Colorado like Connecticut has recognized the principle that the police power of the State cannot be surrendered in cases where it might involve the health or safety of the people. There are two leading cases in Colorado which determine this matter. One is the case of *The Colorado & Southern Railway Company v. Fort Collins*, 52 Colorado, 281. In that case the railway company had been granted the right of way in certain streets in the City of Fort Collins, and the City afterward, in the exercise of its police power, passed the following ordinance:

“It shall be unlawful for any person, persons or corporation owning or operating a railroad or in any way engaged in the running or handling of railroad trains, locomotives or cars, to use any railroad track upon any railroad street south of the north line of West Mountain Avenue in said City, for the purpose of shifting or switching cars, or the making up or breaking up of trains.”

Upon a review of a conviction under such ordinance the Court at page 286 of its opinion said:

“Whatever rights were granted to the railroad company or its assignors, to construct a line of road along or across the public streets of the appellee must be measured and determined by the ordinance.”

It was urged in that case that the railroad company had a grant from the State and that the attempt

to prevent the company using its tracks for the purposes mentioned in the ordinance was a violation of the contract between the State and the railroad company. The Court, in quoting from *Hopkins v. Baltimore, etc., R. R. Co.*, 6 Mackey, 311, at page 288, says:

“A railroad company may and should possess itself of proper accommodations on its own property, where this dangerous process of shifting and making up trains may be conducted in safety, without continual risk and inconvenience to the public. Citizens have the right at all times to cross the streets and send their children and servants along them on lawful errands without peril or delays, and to enjoy some intervals of quiet from the noises of movements that should be conducted within proper inclosures of this company, in more secluded portions of the City.”

And in quoting from *Railroad Co. v. May*, 122 Ga., 1—4, at page 289, the Court continues:

“It cannot use the street as a depot, or a place for loading or unloading cars. And it has been repeatedly held that a railroad company cannot use the street as a yard, or for switching or drilling purposes.”

In conclusion, at page 292 of the *Ft. Collins* case the Court said:

“The record shows that immediately prior to the passage of the ordinance, the manner of operating appellant’s road materially affected the usefulness of certain streets for the purpose for which they were intended. We are of the opinion, therefore, that the regulation and control of such streets, as contemplated by the ordinance, is just and right, and within the power of the municipality. The judgment should be affirmed, and it is so ordered.”

The case of *Moffat v. Denver*, 57 Colo., 473, was another case in which the Court held that a right of way or easement in a street was subject to the exercise of the police power of the City in making the street safe for the public.

After the easement had been granted to the water company in this case, and after it had laid its pipes in the street, the City of Denver, by ordinance, provided for the construction of a subway known as the Alameda Subway. The construction thereof made it necessary to remove the pipes of the water company entailing an expense of over \$12,000, part of the pipes having to be constructed over an entirely new route. The company claimed that by reason of having been granted a franchise, and by reason of the occupancy of the street it had a property right of which it could not be deprived without just compensation.

At page 477 of its opinion the Court in answer to these contentions said:

“The prime purpose of a street is to provide a way for the use of the people at large for travel on foot and in ordinary vehicles. The power to grade streets and construct subways for the safety and convenience of the public is vested in the City authorities. They may grant an easement in its sub-surface in the manner and for the purposes by law provided, *but the right thus granted is not absolute. It is only qualified.* Placing pipes in the avenue under the franchise granted by the City, and contract to which we have referred, did not give the Water Company a vested right to have them remain as placed and un-

disturbed. The rights thus granted were subordinate to the rights of the public therein, and subject to the power of the municipal authorities to make such reasonable changes in the grade or an improvement therein as in their judgment the public interests demanded and required. Consequently, the Water Company is not entitled to be compensated for the expense incurred in removing and reconstructing its pipeline over a new route, which was necessitated by a change of grade and the construction of a subway. Refusing reimbursement for such expense is not taking property for a public use without compensation." *Italics ours.* (Citing cases.)

The case of New Orleans Gas Company v. Drainage Commission, 197 U. S., page 453, was a case in which the Gas Company had acquired a franchise to locate its pipes under the streets of the City. In order to accommodate the drainage system the Drainage Commission, under authority vested by statute, sought to make a change. It was not contended in that case that the power was not vested in the Commission to make such change, but the only claim made was that compensation would have to be paid therefor. But this Court held that the right when given in the public street had been given subject to the police power of the State, and as long as the same is reasonably exercised it was not in violation of the Gas Company's constitutional rights, and did not take its property without due process of law. And this Court in concluding its opinion on page 462 says:

“The gas company, by its grant from the City, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The City made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.”

In the case of *Reinman v. Little Rock*, 237 U. S., 171, the question of the power of a municipality over subjects of this character was discussed as follows:

“While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the lawmaking power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of equal protection of the laws, within the meaning of the 14th Amendment.”

As above stated in this brief the company has been provided with another terminal, and has constructed its tracks, sidetracks and switches at this other terminal or has acquired the right

to the use of such terminal facilities where they are much better than they could possibly be on Wynkoop Street. It has the right by interchange with The Union Pacific Railway Company for that portion of its track serving its patrons beyond Seventeenth Street. It not only has this right by arrangement with The Union Pacific Railway Company, but it has the right under the law to require of the Union Pacific the permission to use its trackage facilities.

See case of

Grand Trunk Ry. v. Michigan Ry. Comm.,
231, U. S. 457, 469.

But it complains that if it be required to pay The Union Pacific Company for switching charges that they will, therefore, be damaged to the extent of from one thousand to fifteen hundred dollars per year. But this is not the taking away of property but a slight increase in cost of operation incurred for the general welfare. Where the exercise of the police power is sought by a municipality, or by a State, for the convenience, safety and general welfare of the public the only limitations of such exercise is that it should be reasonable. Courts should not be asked to declare an act unconstitutional unless the legislative requirement has transcended its latitude of discretion. In other words, it must first be shown that the legislative act was clearly unreasonable and arbitrary. The City could have required the Railway Company to have built a viaduct over its tracks at Seventeenth Street, or to have built a subway under the tracks. It could have required it to lower its grade, or change its grade to whatever

extent that might have been deemed necessary to insure the public convenience and safety, and it could have required the company to maintain and keep up the viaduct or subway, or could have required it to maintain gates and watchmen at this intersection, and the expense of any of these methods of making the intersection safe would have been many times greater than the amount the company would have to pay to the other railroad company for an exchange of its tracks. And furthermore no means could have been provided at this intersection which would have been as convenient to the public, or made it as safe for the public as to discontinue the use of this short stretch of track.

On pages 79 to 84 plaintiff in error contends that the ordinance in question would be an interference with interstate commerce and cites a number of cases with an attempt to bear out this contention. Perhaps the most prominent of the cases cited is the *Kansas City Southern Railway Company v. Kaw Valley Drainage District*, 233 U. S. 75, and also the case of *Illinois Central Railroad v. Illinois*, 163 U. S. 142. They quote from the latter case as follows:

“But the State can do nothing which will directly burden or impede the interstate traffic of the company or impair the usefulness of its facilities for such traffic.”

But in the present case the track involved is not a facility for interstate commerce. The portion of the track lying beyond the intersection of Seventeenth and Wynkoop Streets is merely employed, not as a sidetrack for making up trains, but a place in the street where cars are permitted to

stand until unloaded by the patrons of the road. It is not a facility for the railroad, it is a facility for the patrons. But furthermore in the exercise of the police power the state has the right, not to take away, but to inconvenience to a reasonable extent not only the patrons of a road but the railroads themselves if the safety and convenience of the public demands it. The industries furnished beyond this intersection might be put to the inconvenience of transferring some of their freight by drays or otherwise, or as has been elsewhere said the railroad might be put to a small expense by making an interchange with the Union Pacific Railroad Company, or even by having to pay the Union Pacific a small switching charge. But the great principle involved is the same with reference to this interstate commerce question as it is with reference to the taking of property without compensation, and that is as to whether or not it is a reasonable exercise of the public power under the circumstances.

In the case of Grand Trunk Railway Company v. Michigan Railway Commission (*supra*), where an order has been made by the State Railroad Commission requiring two railroad tracks of the state to make track connections, this Court said:

“ * * * it was a proper exercise of the power of *regulation* of the business of the company. The reasoning to sustain this conclusion need not be reproduced. It rests upon the ultimate proposition that the railroad companies ‘*are organized for the public interest and to serve primarily the public good and convenience.*’ ” (Italics ours.)

Bearing in mind then the scope of the police power, the liberality with which Courts construe it when the public safety, convenience and welfare are involved, and bearing in mind the reluctance of Courts to interfere with legislative acts which have for their purpose the protection of public health, safety and convenience, would it be deemed unreasonable to require this company to remove its tracks, and thereby make safe a point which has the most travel of any point in the State of Colorado.

The opinion of the Supreme Court of Colorado in this case is a well considered opinion, not only from the legal view of the matter but the pertinent facts involved, and it is fair to presume that the members of the Court were thoroughly familiar with the condition existing in regard to this track, and it must be assumed that the members of the Court took judicial notice of the manner in which this switch effects the safety and convenience of the public.

Respectfully submitted,

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J. J. LIEBERMAN,

Attorneys for Defendants in Error.

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Supreme Court, U. S.
FILED

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JAMES D. MAHER,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 322.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER ET AL.,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
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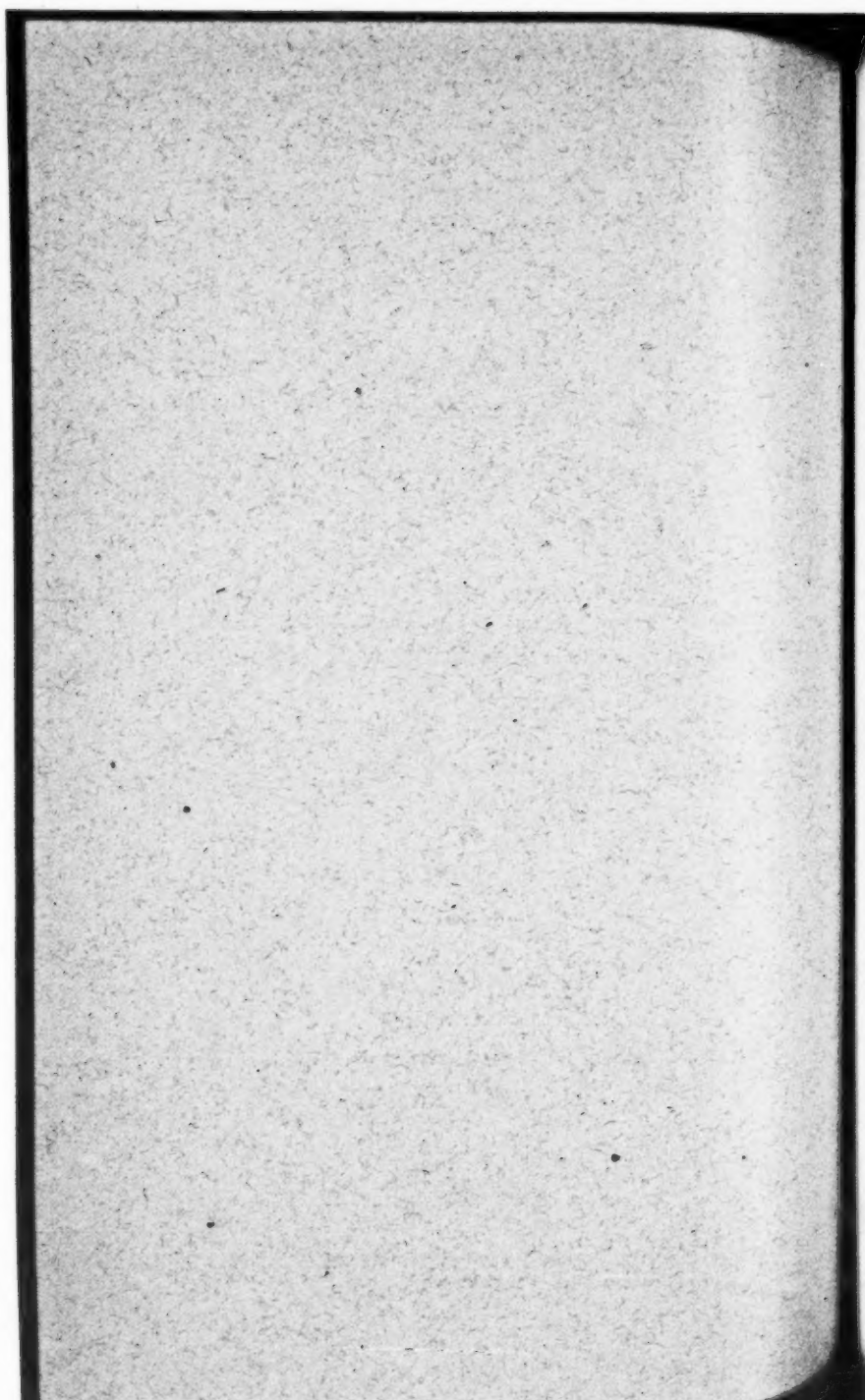
IN ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY
OF DENVER, STATE OF COLORADO.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

JAMES A. MARSH,
NORTON MONTGOMERY,
J. J. LIEBERMAN,
Attorneys for Defendants in Error.

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SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

Since the filing of original brief of defendants in error, the plaintiff in error has filed a reply brief and has notified the clerk of this court and counsel for defendants in error that

plaintiff in error desires to submit its case on briefs without oral argument. At the time defendants in error prepared their brief it was expected that the case would be argued orally before the court. In view of this, defendants in error also submit their case without oral argument, but in so doing ask leave to have this supplemental brief filed and considered.

The opinion of the Supreme Court of Colorado was a decision *en banc*, all members of the court concurring, and is to be found on pages 105 to 109 of the Transcript of Record. See City and County of Denver *et al.*, plaintiffs in error, *vs.* Denver & Rio Grande Railroad Company, defendant in error, 167 Pac., 969; L. R. A., 1918-D, page 659. A reference to the map found at page 74 of the record will facilitate an understanding of the case. The green lines represent the track of the D. & R. G. Railroad Company, and the red lines those of the Union Pacific Railroad Company; and while the map indicates that there are two tracks of the D. & R. G. Railroad Company at the intersection of 17th Street and Wynkoop Street, it is stipulated in the record (page 53 of Record) that there is but one track of the D. & R. G. Railroad at this intersection, and plaintiff in error so states in its brief (See p. 5 orig. brief); the other track crossing the intersection being that of the Union Pacific Railroad Company. While the map does not show the location of the present Union Depot, where all trains receive and discharge passengers in Denver, Wynkoop bounds it on the southerly side; said depot is just northerly from said intersection, and as is shown by the testimony the point where the intersection involved is, is directly in front of the entrance to said Union Depot and is the main thoroughfare in going to and from said Union Depot (Record, p. 107). The location of the intersection involved and the large number of persons crossing said intersection daily is one which makes the case of surpassing importance to Denver and her people considering it from a standpoint of public safety, convenience and general welfare, and while it

is of great importance to Denver and her people that the right of the city in the exercise of its police power to remove said track should be upheld, the importance of this right will grow from year to year as the city continues to increase in population. It was apparent to the Supreme Court of Colorado and we think it will likewise be obvious to this court that it is neither safe nor desirable that a railroad track should be operated directly in front of the Union Depot and over the main thoroughfare going to and from the same for the purpose of moving freight cars either in the day or night time. It is to be borne in mind that when this track was located it was located for a main line and for the purpose of reaching the then depot at 19th and Wynkoop Streets. But for the benefit of all concerned, the depot was moved to its present location; another street provided for the main line, and certain streets and alleys vacated for the purpose of accommodating the new Union Depot, and the tracks entering the same. *Whitsett vs. Union D. & R. Co.*, 10 Colo., 243, 247, 248. So it clearly appears from the record that the city has granted and afforded another location for the track which plaintiff in error says was constructed by virtue of Ordinance 9 of 1871. But plaintiff in error asserts that it now has a right to maintain an industry track or spur track because originally it was granted the right to build this main line track which has now been removed, notwithstanding said ordinance of 1871 required that the railway company should own the land on both sides of the street before such spur tracks should be maintained, and because of the ratification acts and ordinances which plaintiff in error asserts have been passed. The ordinances of 1875 and 1878, if effective at all, grant no greater rights than the original ordinance granted because they do not purport to go further than to ratify the provisions of the ordinance of 1871, which the trial court, although granting the injunction, held to be void (see page 95 of Record). We think this case is very similar to and is ruled by the case of Seaboard Air Line Rail-

way *vs.* City of Raleigh, 242 U. S., page 15. The following quotation from that case, beginning at page 19, is pertinent:

"The contention that even though this be the case, inasmuch as the railroad had for a long time operated the spur track on the sidewalk and used it for its general railroad purposes with the assumed knowledge and assent of the city, thereby the existence of a contractual and permanent right must be inferred, is manifestly without merit. Indeed it amounts to saying that possession under a mere license was capable of causing that which was revocable and precarious to become contractual and permanent."

And in the Bristol case, 151 U. S., 556, this court held a railway crossing could be abated in the exercise of the police power.

We think the most that can be said as a result of the various acts and circumstances relied upon by plaintiff in error, is that the railroad has been operating this industry track as a mere licensee, and that requiring it to remove the track at the intersection only, is no impairment of any right under the Constitution of the United States, but is a legitimate, reasonable and proper exercise of the police power by the city. It is conceded that all of the tracks on Wynkoop Street west of the intersection are still connected with the other tracks of the D. & R. G. Railroad, and as will appear from the evidence and the map already referred to, the tracks of the D. & R. G. R. R. Co. east of the intersection involved, are connected up with those of the Union Pacific Railroad Co. and it does not seem to be disputed that the industry track east of the intersection may be used to accommodate the industries located thereon in connection with the track of the Union Pacific Co. now connected therewith. But plaintiff in error says that there is some expense involved in connection therewith and some loss of revenue on account of being obliged to operate in this way. This is not a sufficient reason to prevent the city from exercising its police

power for the protection of persons passing over this thoroughfare and for the benefit of the public safety.

Importance is attached to the paving ordinance. It was a general ordinance of 1912 applying to all railroads alike in that district and simply required them to pave between the rails and two feet outside thereof. This amounts to no recognition and creates no estoppel under the circumstances.

Plaintiff in error says at page 16 of its reply brief in discussing the ordinance of 1871: "Even if such conditions were attached to the building of the track in question and even though that condition had not been complied with, acquiescence by the city for forty years would amount to a waiver of that condition." This in substance, as we understand, was the argument used in *Seaboard Air Line vs. City of Raleigh*, *supra*, and was the doctrine renounced by this court. And as we understand the reply brief of plaintiff in error, it is contended that if no one of the several acts relied on are sufficient, taken collectively, they are sufficient to grant a right to occupy this street, and that the city is now estopped to deny such right. This thought is to be found at page 3 of the reply brief, where it is said: "A proper consideration of this condition requires that the entire group of laws, acts, ordinances and facts be taken into the reckoning if equitable results are to be reached." We do not think that this court can seize upon any such uncertainties for the purpose of denying to a municipality the right to exercise its police power for the benefit of the public safety and general welfare.

It is stated on page 19 of the reply brief that the D. & R. G. R. R. "does not reach the Denver Union Terminal Depot" and that "it has no track through the depot grounds." We cannot think that counsel intend by this statement to mean that the Denver Union Terminal Co., which is simply a holding company for the benefit of all the railroads entering Denver, does not operate the Union Depot for the benefit of the D. & R. G. Co. as much as for the benefit of the other railroads

using it for terminal facilities. Neither can we think that it is seriously contended that if the city would ordinarily have the right in the exercise of the police power to prevent the use of this intersection for the operation of freight trains to serve a few industries located on a spur track, the fact that some of the commodities in the freight cars passing over the track may go into interstate commerce will prevent the exercise of the police power for the benefit of the public safety. The only limitation upon the exercise of the police power is that it must not be unreasonable and what might be considered unreasonable at comparatively unimportant intersections might be very reasonable and proper on a main thoroughfare directly in front of a union depot where thousands of people pass and repass every day in the year. We think that plaintiff in error has been unable to point to any definite or specific authority giving it a right to operate freight cars over this spur or industry track at the intersection involved, and that if it could point to such authority that the Supreme Court of Colorado is right in saying that, under the circumstances, considering the nature of the thoroughfare, it is a reasonable and proper exercise of the police power for the city to require the removal. It would be an exceedingly unfortunate thing for the welfare of Denver if it does not have such a right.

Respectfully submitted,

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Attorneys for Defendants in Error.

Counsel for Plaintiff in Error.

DENVER & RIO GRANDE RAILROAD COMPANY
v. CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

DENVER & RIO GRANDE RAILROAD COMPANY
v. CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF
DENVER, STATE OF COLORADO.

Nos. 322, 323. Submitted April 23, 1919.—Decided June 2, 1919.

Contract and property rights of a railroad company in respect of the operation of a track in a public street are held subject to the fair exercise by a State, or by a municipality as its agent, of the power to make and enforce regulations reasonably necessary to secure public safety. P. 244.

A track constructed under ordinance grant by a railroad as part of its main line but later used only to serve abutting private industries, traversed a city side street and crossed a thoroughfare used daily by thousands of people in approaching and leaving the Union Depot, which was very near the intersection. *Held*, that an ordinance of the city requiring removal of the track where it crossed the thoroughfare, for the safety of the public, did not violate the rights of the railroad under the contract and due process clauses, it appearing that use of the track could still be maintained through connections with the yards of its owner and of another company, and that resulting expense and loss of revenue would be relatively small. P. 245.

An ordinance which makes no discrimination against interstate commerce, and affects it only incidentally and indirectly, is not objectionable under the commerce clause. P. 246.

167 Pac. Rep. 969, affirmed.

THE case is stated in the opinion.

Mr. E. N. Clark for plaintiff in error. *Mr. J. G. McMurry* was on the briefs.

Mr. James A. Marsh and Mr. Norton Montgomery for defendants in error. *Mr. J. J. Lieberman* was on the briefs.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin the enforcement of an ordinance directing the removal of a railroad track from the intersection of two streets in Denver. On the hearing the plaintiff prevailed, but this was reversed by the Supreme Court of the State with a direction to dismiss the complaint, 167 Pac. Rep. 969, and the direction was followed. The case is here on two writs of error when one would suffice.

The ordinance is assailed as contravening the contract and commerce clauses of the Constitution and the due process clause of the Fourteenth Amendment.

In 1881 a union depot with appurtenant tracks was established in Denver, the streets and alleys within the grounds thus occupied being vacated by the city; and since then all railroads entering the city have used this depot and its tracks. Wynkoop Street is outside the depot grounds and extends east and west along their south line. The depot faces that street and is but a short distance from it. On the other side of the depot are the depot tracks. These connect on the west with several railroad yards including that of the Rio Grande Company, and on the east with other railroad yards, including that of the Union Pacific Company. Wynkoop Street is intersected just opposite the entrance to the depot by Seventeenth Street, which extends northward through the city and is one of its main thoroughfares. Persons and vehicles approaching or leaving the depot pass over this intersection, the number doing so each day being approximately two thousand.

The plaintiff, the Rio Grande Company, has a track in Wynkoop Street from Nineteenth Street to Fourteenth Street. At its eastern terminus—near Nineteenth Street—this track meets a track of the Union Pacific Company which is connected with the yard of that company, and at Fourteenth Street it curves and leads to the Rio Grande Company's yard. Originally it was part of the Rio Grande Company's main line, but since 1881, when the union depot was established, it has been used only as a side track in serving industries on the south side of Wynkoop Street.

The ordinance assailed directs the removal of so much of this track as lies within the intersection of Wynkoop and Seventeenth Streets, that is to say, the portion over which persons and vehicles pass in moving to and from the union depot; and a preamble recites that the use of that portion of the track impedes public travel, affects the safety of persons approaching or leaving the union depot and is no longer essential to the Rio Grande Company.

The Union Pacific Company has a track in the same intersection which the ordinance deals with in the same way, but that company apparently is not complaining.

If the ordinance is enforced the Rio Grande Company can reach the industries on its track in Wynkoop Street between Seventeenth and Nineteenth Streets only through the tracks of the union depot and the Union Pacific. Because of this it will be subjected to some expense and delay not heretofore attending that service, and it also will be prevented from switching cars to and from those industries for other railroads and thereby will lose some revenue. But, according to the record, the loss in expense and otherwise incident to these disadvantages will be relatively small.

The track in Wynkoop Street has been there since 1871, and we shall assume, as did the Supreme Court of the State, that it was put there in virtue of some ordinance of

that period, and that the ordinance became a contract and the right granted became a vested property right. But, as this court often has held, such contracts and rights are held subject to the fair exercise by the State, or the municipality as its agent, of the power to adopt and enforce such regulations as are reasonably necessary to secure the public safety; for this power "is inalienable even by express grant" and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clause of the Fourteenth Amendment. *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558; *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76. Of course, all regulations of this class are subject to judicial scrutiny and where they are found to be plainly unreasonable and arbitrary must be pronounced invalid as transcending that power and falling within the condemnation of one or both, as the case may be, of those constitutional restrictions.

The scope of the power and instances of its application are shown in the decisions sustaining regulations (a) requiring railroad companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting in bridges or viaducts at public crossings, *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis*, 232 U. S. 430; *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121; (b) requiring a railroad company at its own cost to change the location of a track and also to elevate it as a means of making travel on a highway safe, *New York & New England R. R. Co. v. Bristol*, 151 U. S. 556; (c) prohibiting a railroad company from laying more than a single track in a narrow busy street although its franchise authorized it to lay a double track there, *Baltimore v. Baltimore Trust Co.*, 166 U. S. 673; and (d) requiring a gas company whose mains and pipes were laid beneath the surface of a street under an existing franchise to shift them to another

location at its own cost to make room for a public drainage system, *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453.

Is the ordinance here in question plainly unreasonable and arbitrary? That there is occasion for some real regulation is clear. The crossing is practically in the gateway to the city. Persons in large numbers pass over it every day—many of them unacquainted with the surroundings. Moving engines and cars to and fro over such a place makes it one of danger. Any one of several forms of corrective regulation might be applied. To illustrate: The city might call on the railroad company to construct and maintain a viaduct over the crossing or a tunnel under it; or might lay on the company the duty of maintaining watchmen or flagmen at the crossing. What it actually does by the ordinance is to call on the company to remove the track from the crossing and avail itself of other accessible and fairly convenient means of getting cars to and from its track east of the crossing. No doubt in this the company will experience some disadvantages, but they will be far less burdensome than would be the construction and maintenance of a viaduct or tunnel, and not much more so than would be the keeping of watchmen or flagmen at the crossing.

The situation is unusual and the ordinance deals with it in a rather practical way. Giving effect to all that appears, we are unable to say that what is required is plainly unreasonable and arbitrary.

Counsel for the company manifest some concern lest the rates for switching cars to and from its track east of the crossing may not be satisfactory, but there hardly can be any real trouble along that line. The rates will be subject to investigation and supervision by public commissions just as are other railroad rates, and possible differences over them will be susceptible of ready adjustment.

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The objection that the ordinance offends against the commerce clause of the Constitution is not tenable. The ordinance makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly. *South Covington Ry. Co. v. Covington*, 235 U. S. 537, 540; *Sligh v. Kirkwood*, 237 U. S. 52, 58, 60. The case of *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U. S. 75, obviously is not to the contrary.

Judgment affirmed.